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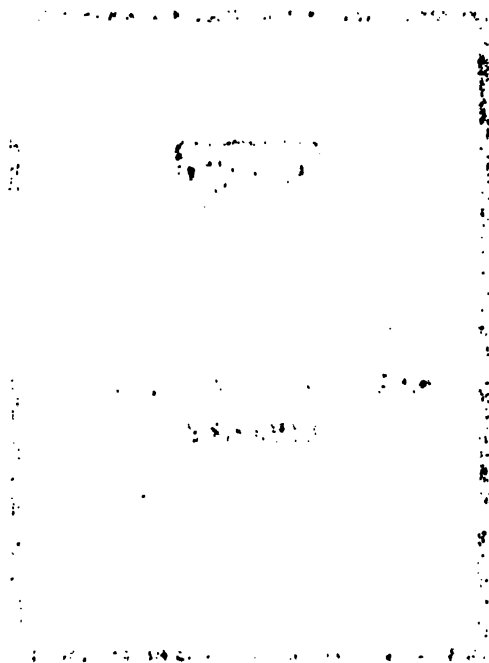
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REPORTS OF CASES

ADJUDGED IN

//

THE COURT OF APPEALS

OF THE

DISTRICT OF COLUMBIA

FROM APRIL 27, 1897, TO DECEMBER 8, 1897.

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Published by Authority of the Court.

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CHARLES COWLES TUCKER,  
REPORTER.

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VOLUME 11,  
(To be cited as "11 App. D. C.")

WASHINGTON, D. C.  
THE LAW REPORTER COMPANY, PUBLISHERS.  
1898.

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CHARLES COWLES TUCKER.

*Rec. Aug. 17, 1898.*

THE LAW REPORTER CO.  
PRINTERS,  
WASHINGTON, D. C.

ORGANIZATION  
OF  
THE COURT OF APPEALS  
OF THE  
DISTRICT OF COLUMBIA  
DURING THE TIME OF THESE REPORTS.

---

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HON. RICHARD H. ALVEY.

*Associate Justices:*

HON. MARTIN F. MORRIS.

HON. SETH SHEPARD.

*U. S. District Attorney:*

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ROBERT WILLETT.

*Assistant Clerk:*

HENRY W. HODGES.

*Reporter:*

CHARLES COWLES TUCKER.



## ADDITION TO RULES OF COURT.

---

### No. XXVI.

To regulate the time and manner of applying for writs of error, and the proceedings thereon, as authorized and directed by Act of Congress, entitled "An Act to amend section four of an Act entitled 'An Act to define the jurisdiction of the Police Court of the District of Columbia,' " approved March 2, 1897.

SEC. 1. Wherever the pronoun *he*, *him* or *his* occurs in the following rules, the same shall be taken to apply to and include all genders, whether masculine, feminine or neuter, and whether singular or plural, as the case may require.

SEC. 2. To entitle a party to apply for a writ of error he shall cause note of his intention to be made at the time of the ruling by the court; and he shall within three days thereafter present to the court a bill of exception properly prepared to present the ruling excepted to, and which bill of exception, if properly prepared, or after correction by the judge, shall be signed by the judge within two days from the date of the judgment or sentence imposed, and he shall file the same in the cause, immediately after signing the same.

SEC. 3. All writs of error shall be applied for within ten days, Sundays and legal holidays excluded, from the day upon which the judgment or sentence of the Police Court shall have been entered or imposed, and not afterwards.

SEC. 4. That the application for writ of error shall be by petition addressed to one of the Justices of this court, wherein shall be stated concisely, but clearly and distinctly, the nature of the proceeding in said court, the trial and judgment therein, and the particular ruling or instruction *upon matter of law*, to which exception has been taken; and which application for the writ shall be signed

by the attorney of the applicant, if he have one, or if not, by the party himself; and such petition shall be verified by an affidavit appended, of the party or his attorney, wherein shall be distinctly stated that the exception has been taken *bona fide*, and that the writ of error is not sought for any purpose of delay.

And to said petition shall be appended a copy of the bill of exception taken and signed by the judge.

SEC. 5. The writ of error, when allowed, shall be issued by the Clerk of this court, and shall be directed to the Judge of the Police Court who shall have tried the case and made the rulings excepted to. Upon receipt of the writ of error by the Clerk of that court, he shall at once and without delay issue notice to the counsel or the party adversely concerned, notifying him of the allowance of the writ of error, and that he is required to appear in this court, to defend and maintain the rights of the defendant in error, at such times as by the rules of this court may be required.

SEC. 6. The Clerk of the Police Court, upon the receipt of the writ of error, shall, with the approval and direction of that court, endorsed thereon, without delay and within a time not to exceed ten days, Sundays and holidays excluded, make up and transmit to this court a transcript of the record of the proceedings therein, certified under the seal of said court; and which transcript of record, if not filed in this court within fifteen days from the date of the allowance of the writ of error, the writ of error shall be dismissed.

SEC. 7. The Clerk of this court upon the receipt of the transcript from the Police Court, shall docket the case, in regular order of reception, upon the Special Docket or Calendar of this court, and such case shall stand for hearing in the regular call of that Special Calendar.

SEC. 8. Upon the decision and filing of opinion in the cases brought into this court on writ of error from the Police Court, the mandate of this court shall at once issue to the Police Court, without delay, and upon filing such mandate the cause shall stand for such further proceedings in

that court as may be directed, or as may be proper under the circumstances of the case, according to law, or as directed by the statute.

SEC. 9. The general rules of this court, regulating the practice thereof, and the requirements as to the preparation of cases for argument, shall all apply to cases brought into this court by writs of error from the Police Court; except in special cases and for special reasons, the court will expedite the hearing of such cases.

Adopted by the court, the 25th day of May, 1897.

Test:

ROBERT WILLETT, *Clerk.*



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REPORTS OF CASES  
ADJUDGED IN  
THE COURT OF APPEALS  
OF THE  
DISTRICT OF COLUMBIA.

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McCARTNEY *v.* FLETCHER.

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EQUITY; STATUTE OF FRAUDS; TRUSTS, EXPRESS AND RESULTING;  
HUSBAND AND WIFE; PRESUMPTIONS; VOLUNTARY CON-  
VEYANCES.

1. A court of equity cannot, under Section 7 of the Statute of Frauds, upon a petition by the heirs of the husband, execute a parol trust agreed upon between a husband and wife at the time of execution of deeds conveying to her the legal title to land, under which parol trust he was to retain the control and beneficial ownership of the property.
2. Under Section 8, of the Statute of Frauds, a resulting trust may arise where an estate is purchased in the name of one person but the purchase money is paid by another; but an exception occurs to this rule where the purchase is made and the purchase money paid by a husband or father and conveyance is taken in the name of the wife or child; in which case, there is *prima facie*, at least, no resulting trust to the purchaser, but the purchase and conveyance will be deemed a gift, advancement or settlement.
3. In such cases, while parol evidence is admissible to establish the collateral facts, not contradictory to the deed, except in case of fraud, from which a trust may legally result, such evidence is received with great caution.
4. Where, in such a case, it appears from the evidence that it was intended that the grantee should take the legal estate only, the equitable interest, or so much of it as was left undisposed of, will result to the grantor or his heirs; but it must clearly appear beyond doubt that the beneficial interest was not intended to be transferred.
5. A conveyance to a wife or child will be presumed to carry a beneficial interest, and whenever that presumption is at-

## Syllabus.

[11 App.

tempted to be overcome, it can only be done by the most indubitable evidence; and where a husband has divested himself of the legal estate in favor of his wife, the presumption that the beneficial interest was intended to pass, is so strong as to be almost irrebuttable.

6. Where it is sought to establish a resulting trust in favor of the heirs of a husband who had allowed the legal title of his land to be taken in the name of his wife by absolute deeds, loose declarations made by the husband in which the wife is not shown to have joined or concurred, unsupported by evidence of any acts of dominion and control over the property after the making of the deeds to the wife, do not furnish evidence even tending to overcome the presumption that the wife took both the legal and beneficial estate in the property.
7. The fact that such deeds recite money considerations as passing from the wife does not furnish evidence that the deeds were not intended as settlements upon the wife by the husband.
8. No presumption that a personal benefit was intended to the party advancing the funds for the purchase of land in the name of another can arise where the obligation exists on his part, legal or moral, to provide for the grantee, as in case of a husband for his wife or a father for his child.
9. The evidence produced on behalf of the complainants in such a case considered, and *held* not sufficient to establish a resulting trust, especially as against the sworn answer of the defendants.
10. The evidence in such a case also held not sufficient to show such an agency on the part of the wife, or fiduciary relations between the husband and wife, as to overcome the presumption that the property was to be owned by her in her own right.
11. The mere making of deeds by a husband to his wife, or his directing them to be made to her as grantee, is not a sufficient part or complete performance, in such a case, as will take the case out of the operation of the Statute of Frauds; nor will the exercise of such authority or supervision over the property as a husband usually exercises over the real estate of his wife, be construed into such acts of ownership as can only be referable to rights of his under the alleged trust.
12. The mere refusal of a supposed trustee to execute a parol trust, or the denial of its existence, is not such a fraud as will take the case out of the Statute of Frauds and authorize a court of equity to enforce the trust.
13. Where any important provision has been omitted from a deed, whether intentionally by the parties, or through mistake of the law as to the necessity of incorporating it in the deed, or through carelessness or inattention at the time of executing the instrument, and no fraud is charged or proved against the

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grantee in the deed, who denies the existence of any such provision as that alleged to have been omitted, parol evidence is not admissible to add to or vary the terms of the instrument.

No. 617. Submitted January 12, 1897. Decided April 27, 1897.

HEARING on an appeal by the complainants from a decree dismissing a bill in a suit seeking to have a trust declared upon certain real estate. *Affirmed.*

The facts are sufficiently stated in the opinion.

*Mr. Hugh T. Taggart, Mr. Robert Christy, Mr. W. V. R. Berry and Mr. A. S. Worthington for the appellant.\**

*Mr. Edmund Burke and Mr. W. L. Cole for the appellees.†*

Mr. Chief Justice ALVEY delivered the opinion of the Court:

The object of the bill in this case is to have determined the question whether certain parcels of real estate held by the defendant, Susan Fletcher, at the time of the death of her husband, William Fletcher, belonged to her in her own right, or were held by her as trustee of her husband in his lifetime, and since his death as trustee for his heirs at law.

William Fletcher died in March, 1893, intestate. He had been twice married, and by his first wife he had two children, Annie C. Fletcher, now the wife of Peter McCartney, and William F. Fletcher. His first wife died in 1861, and he married Susan, the defendant and surviving widow, in 1863, and by her he had five children, namely, Mary J., who is the wife of William E. Collier; Charles P. Fletcher, Katie C. Fletcher, Susan E. Fletcher and James Fletcher, the last named being an infant under 21 years of age. These seven children all survived the father and are his only heirs at law.

The bill was filed by Annie C. McCartney, William F.

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\*For briefs of counsel for appellant, see 10 App. D. C. 586.

†For briefs of counsel for appellees, see 10 App. D. C. 591.

Fletcher, and Mary J. Collier, against Susan Fletcher, the widow; Charles P. Fletcher, Katie C. Fletcher, Susan E. Fletcher, and James Fletcher, the infant. The bill alleges that Susan Fletcher, the widow, when she was married to William Fletcher, was entirely without property of any kind, but that William Fletcher had, at that time, considerable property, and subsequently acquired a great deal more, and became a man of considerable wealth. That being importuned by other persons to make them loans, and to indorse notes, and to become surety on bonds and other obligations, and to engage with them in various speculations and ventures, he, *for the purpose of making it appear* that he was without the means of complying with such requests, resorted to various devices, the principal one of which was to put his property in his wife's name. That several purchases were made of parcels of real estate by the husband, and the money paid therefor by him, and, by his procurement and direction, the deeds therefor were made directly to the wife Susan; that, in other cases, several valuable parcels of real estate owned by the husband, and for which he held conveyances to himself, he conveyed to third parties, for pretended or fictitious considerations, and procured the same to be conveyed to his wife by such third persons, upon like fictitious considerations; and she holds all the property so conveyed, and claims it as her own. It is charged in the bill "that the said Susan, at the time of the making to her of all and singular the deeds aforesaid, well knew and well understood that the lands conveyed were to be held by her simply as trustee, subject in all respects to the uses of him, the said William, and to his control and dominion."

The prayer of the bill is for discovery, and is substantially similar to the prayer for discovery in relation to the real estate contained in the bill in the preceding case, No. 616; and further that the court should "declare that the said Susan, under the said deeds of conveyance to her for

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said lots and parcels of ground in said squares twenty-seven (27), forty-three (43), ninety-nine (99), one hundred and fifty-two (152), two hundred and fifty-four (254), and nine hundred and ninety-five (995), in the city of Washington, and forty-three (43), in the city of Georgetown, *holds the same as trustee* for the complainants and the other children and heirs at law of the said William Fletcher, deceased, in equal shares in fee, and that in and by such decree title to the said lots and parcels of ground in said squares be vested in said complainants and in said other children and heirs at law of said William Fletcher, deceased, in equal shares in fee; and for an account of the rents and profits of the said lots and parcels of ground in squares, &c., which have accrued since the death of him, the said William Fletcher, &c., and that the same may be distributed in equal shares and proportions among his said children and heirs at law." The bill also prays for a receiver, &c.

All the adult defendants were required to answer under oath, and by the answer it is averred that, as to certain parcels of the real estate conveyed to the defendant Susan, she had paid for them from means earned and realized by her own labor and industry, by and with the consent of her husband; and that, as to the other parcels of the real estate conveyed to the defendant Susan, her husband had purchased the same from other persons, and had caused them to be conveyed to her in consideration of his love and affection for her, and with the intention of making her the absolute owner thereof; and that as to all the real estate which she had not purchased with her own means, or which he had not purchased and caused to be conveyed to her in manner aforesaid, he being the owner thereof, had conveyed it to her through third persons, in consideration of love and affection for her, and with the intention of making her the absolute owner of the same. There is an absolute and unqualified denial of any intention or understanding that such conveyances were made in trust for

William Fletcher and his heirs, as charged in the bill, or that any trust whatever, either express or implied, was contemplated in their favor. There is no allegation or pretense that the deeds furnish evidence of any trust, or that there is any writing to evidence a trust, as required by the Statute of Frauds. The deeds are all in form the ordinary deeds of bargain and sale, and contain the ordinary *habendum* clause: "To have and to hold the said pieces or parcels of ground and premises and appurtenances unto the said party of the second part, her heirs and assigns, *to her and their sole use, benefit and behoof forever*;" without more as to the use of the estate. The defendants set up and rely upon the provisions of the Statute of Frauds, 29 Car. 2, Ch. 3, as a bar to the attempt to engraft upon the deeds an express parol trust in favor of the deceased, William Fletcher, and his heirs.

The first and principal question in the case is, whether the Statute of Frauds has application, or whether the alleged trust is of a character to be excluded from the operation of Section 7 of the Statute of Frauds, and embraced within the exception contained in Section 8 of that statute. This question depends upon the terms of the statute, the agreements and understandings under which the conveyances were made, and the relation of the parties and the circumstances of the case.

By Section 7 of the Statute of Frauds, it is enacted that "*all declarations or creations of trusts or confidences, of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trusts, or by his last will in writing, or else they shall be utterly void and of none effect.*"

Section 8 of the statute provides that "where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may *arise or result by the implication or construction of law*, or be transferred or extinguished by an act or operation of law, then, and in every such case,

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such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding."

Whether the complainants by the allegations of their bill intended to set up and engraft upon the deeds to the wife an express parol trust, or to attempt to establish by parol proof an implied and resulting trust in the husband, William Fletcher, and his heirs, would seem to admit of some doubt. From the terms of the allegations of the bill, it would appear that an express parol trust was in the contemplation of the pleader; and this is more clearly shown by the contention in argument, as stated in the elaborate and carefully prepared brief of the counsel for the complainants. It is there contended, on behalf of the complainants, "that it was agreed between the husband and wife that the title to the real estate of the husband should be vested in the wife, to the end that she might manage that, as well as his personal property, as his agent; that the deeds by which the legal title to the real estate here involved was vested in her were made in pursuance of this understanding and agreement; that the purchase money in each case was paid from funds belonging to him; and that the understanding between him and her at the time each of the deeds in question was made was that she was to hold the same as his agent and trustee and for his benefit; and that this agreement was actually carried into effect up to the time of his death; that it therefore follows that, although there was no writing or memorandum signed by her evidencing the agreement, his heirs, as to the real estate, are entitled to have the agreement enforced, notwithstanding the Statute of Frauds."

This is a broad and very sweeping contention, and it seems to be founded upon a theory of a right to *specific execution of the parol trust agreed upon at the time of the execution of the deeds to the wife*; and if this contention were founded upon authority, it would leave nothing to be investigated except the question

of fact, whether such an agreement or understanding as that alleged and contended for in argument actually existed at the time of the making of the several deeds to the wife. But it is only necessary to read the seventh section of the Statute of Frauds to see that such contention is in the teeth of the terms of that section, and that such contention can not be supported, if any force or effect be allowed to the terms of the statute. Indeed, in view of the character and nature of the evidence produced in support of the contention stated, no case could occur that would more fully demonstrate the wisdom of the statute than the present. The evidence is of the most doubtful and indefinite character; and such case as that here presented for the support of an express parol trust falls within the cogent reasoning and vigorous language of the late Mr. Justice Grier, speaking for the Supreme Court, upon the subject of the wisdom and application of the statute and of the loose and uncertain evidence that it was intended to exclude, in the case of *Purcell v. Miner*, 4 Wall. 513, 517. This court has also passed upon the application of the statute, in a case where an attempt was made to engraft an express parol trust upon a conveyance of property, without anything on the face of the conveyance to indicate the trust. *Meech v. The Smithsonian Institution*, 8 App. D. C. 490. In that case it was held that the statute applied and that the attempt to establish the trust by parol evidence could not be maintained; that the parol agreement in relation to the trust was simply null and void under the statute.

But, viewing this case in its most favorable aspect, and treating it as an effort to bring it within the scope and purview of Section 8 of the Statute of Frauds, whereby a trust or confidence may *arise or result by implication or construction of law*, the attempt must be equally abortive and unavailing.

Resulting trusts, or those which arise by implication of law, are, as we have seen, especially excepted from the

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operation of the statute, and trusts of this nature arise in three cases: First, where the estate is purchased in the name of one person, but the purchase money is paid by another. Secondly, where a conveyance is made in trust declared only as to part, and the residue remains undisposed of, nothing being said or declared respecting such undisposed of part; and, thirdly, in cases of fraud. *Lloyd v. Spillett*, 2 Atk. 150. In regard to the first class of resulting trusts, just mentioned, an exception occurs where the purchase is made and the purchase money paid by a husband or father, and the conveyance is taken in the name of the wife or child. In such cases there is, *prima facie*, at least, no resulting trust for the purchaser, but the purchase and conveyance will be deemed a gift, advancement or settlement as the case may be, for the wife or child, because of the duty or obligation of the husband or father to make provision for his wife or child. In all such cases, however, it appears to be settled, after some conflict of decision, that parol evidence, though received with great caution, and not deemed sufficient unless it be of a very clear character, is admissible to establish the collateral facts (not contradictory to the deed, unless in the case of fraud), from which a trust may legally result. 2 Story Eq. Jur., Secs. 1201, 1202; *Lench v. Lench*, 10 Ves. 517; 4 Kent Com. 305. And as a resulting trust may be established by parol evidence, it may also, notwithstanding the statute, be rebutted by the same species of proof; and therefore parol evidence will be admitted to prove the purchaser's or grantor's intention that the person to whom the conveyance was made should take beneficially. 2 Sto. Eq. Jur., Sec. 1202; *Dyer v. Dyer*, 2 Cox R. 93; Sugden on V. & P., Ch. 15, Sec. 2, pp. 615 to 628; 2 Tayl. Ev., p. 896.

The larger portion of the real estate that was conveyed to the wife in this case, was conveyed by the husband to third parties, and by such third parties conveyed to the wife. It is said in the authorities that it is a common case

of a resulting trust, where the owner of both the legal and equitable estate conveys the legal title only, without conveying the equitable interest. In all such cases, however, there ought to be apparent some good reason for the attempt to separate the legal from the equitable estate. The general rule in such cases is, *that wherever it appears upon a conveyance* that it was intended that the grantee should take the legal estate only, the equitable interest, or so much of it as is left undisposed of, will result to the grantor or his heirs. 1 Perry on Trusts, Sec. 150. This may occur where a husband owning both the legal and equitable estate, conveys the property either directly to the wife, or to a third person, and that third person, by the direction of the husband, conveys to the wife. But in such case, it must clearly appear beyond doubt, that the beneficial interest *was not intended to be transferred*; and whether the conveyance in such case was intended to convey the beneficial as well as the legal estate, is sometimes left to rest on presumption, but more frequently it is expressed upon the instrument itself in such manner as to leave no doubt of the intention of the parties. A grantor of a voluntary conveyance may always protect or secure any beneficial interest that he may desire to retain in the property, either by proper limitations or by power of revocation; and if he fails so to secure himself, the presumption becomes very strong that it was the intention to convey all interest both legal and equitable. *Cook v. Hutchinson*, 1 Keen, 42, 50; 1 Perry on Trusts, Secs. 150, 151. There seems to be no general rule that can be stated that will determine in all cases when a conveyance will carry with it a beneficial interest, and when it will be construed to create a trust by implication or construction of law; but the intention is to be gathered in each case from the scope of the instrument and the special circumstances under which it was made. There is one general principle, however, that may be stated as settled, and that is, that a conveyance made to a wife or child will be presumed to carry a beneficial interest,

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and whenever that presumption is attempted to be overcome, it can only be done by the most indubitable evidence. And where the husband, as in this case, has divested himself of the legal estate in favor of his wife, the presumption that the beneficial interest was intended to pass is so strong as to be almost irrebuttable. Indeed, in such case, there is no substantial reason for the conveyance, if not to convey the beneficial interest, as well as the mere legal title. And another principle must be kept in mind, and that is, that no parol evidence can be allowed to contradict the terms of the deeds, except where they are impeached for fraud.

It is alleged in the bill that the grantor, the husband, retained his dominion and control over the property conveyed, up to the time of his death. But this is a mere general allegation, without designating what particular or kind of acts of dominion and control were exercised by him, and whether such acts were exercised against the will and consent of the wife, or otherwise; and the record furnishes no admissible evidence of any such acts of dominion and control over the property, after the making of the deeds to the wife, as would indicate an exclusive ownership in himself, regardless of the title in the wife. The deeds to the wife were all duly executed, delivered, and recorded; and the property assessed in her name; and the charge both in the present and the preceding case, No. 616, is that the wife collected and received all the rents of the property embraced in the several deeds to her. Loose declarations made by the husband, upon mere chance occasions, in which the wife is not shown to have joined or concurred, and his desire to make a will just before his death, do not furnish evidence even tending to overcome the presumption that both the legal and beneficial interest in the property had been conveyed to the wife by the deeds to her.

There is no charge of fraud or undue influence practiced upon the decedent to induce him, against his free will and judgment, to convey and cause to be conveyed the property

to his wife. The theory of the bill is, that the making of the deeds were the voluntary acts of the husband, but made for a mere ostensible object of his own, and as a shield and protection against the importunities of his friends; and while such may have been one of the motives for his action, it does not follow that it was the only motive that actuated him in making the deeds to his wife. As the owner of the property, he certainly had entire and absolute control of it, with full and unqualified right to dispose of it as he thought proper, either by deed or will, provided he did not impair the legal rights of others, such as creditors. In the absence of any superior claims, he had the undoubted right and power, without any money consideration, to make and cause to be made voluntary deeds of the property in controversy to his wife, for her beneficial enjoyment; and if the facts and circumstances of the case are not sufficiently strong to rebut and overcome the presumption that the deeds were intended to convey the beneficial interest in the property, as well as the legal estate, the complainants have no ground whatever for relief. *Groff v. Rohrer*, 35 Md. 327, and the authorities there cited. As said by Mr. Chief Justice Marshall in the case of *Sexton v. Wheaton*, 8 Wheat. 229: "It would seem to be a consequence of that absolute power which a man possesses over his own property, that he may make any disposition of it which does not interfere with the existing rights of others, and such disposition, if it be fair and real, will be valid. The limitations on this power are those only which are prescribed by law."

The making of the deeds in this case to the wife would seem to have been in the exercise of that unquestionable right of the husband over his own property.

There is a class of cases much relied upon by the counsel for complainants, of which the case of *Young v. Peachey*, 2 Atk. 254, may be considered the leading one; and that case is cited and quoted from in the brief of counsel for the complainants, with strong emphasis. The decision in that

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case was by Lord Chancellor Hardwicke, and it is not only entitled to great respect, but it maintains a most important principle of equity jurisprudence. That was a case where a father, upon deceitful and fraudulent representations as to the objects and purposes of the conveyance, obtained an absolute conveyance from his daughter, professedly for one object or purpose only, and after obtaining the deed, he made use of it for another and a wholly different purpose; and the court held that the plaintiffs were entitled to relief upon the ground of fraud. In that case there was no real or valuable consideration for the deed, though there was a consideration appearing on the face of it; and one of the grounds urged for relief was that there was a resulting trust in favor of the daughter, or those entitled in her right; but as to that contention the Lord Chancellor said:

"Now, as to that, I am of opinion that there was no such trust; for if a trust by implication was to arise in the present case, it would be to contradict the Statute of Frauds; for it might be said in every case, where a voluntary conveyance is made, that a trust shall arise by implication; but that is by no means the rule of the court. Trusts by implication, or operation of law, arise in such cases where one person pays the purchase money, and the conveyance is taken in the name of another, or in some other cases of that kind. But the rule is by no means so large as to extend to every voluntary conveyance. For these reasons," his lordship said, "the plaintiffs could not be relieved under the notion of a trust; however, he thought that they had a proper ground for relief under the head of fraud."

In the present case, there is no charge of fraud, or deceit, or misrepresentation of any kind, in obtaining the deeds to the wife, nor are the deeds asked to be vacated; but the relief prayed is that a trust be declared, which is founded upon the assumption that the deeds are valid conveyances as to the *legal estate* in the property conveyed.

The deeds all recite money considerations as passing from

the wife, and this fact is relied on as a circumstance to show that the deeds were not intended as settlements upon the wife by the husband, even though such recitals are shown not to be founded in fact. The making of these deeds were the acts of the husband, and the effect and operation of the deeds, as voluntary instruments, are in no manner affected or restrained, as between the husband and wife, and those claiming under them, because of the misrecital of the consideration. As against creditors of the husband a different question might arise.

A similar question to that here suggested arose in the case of *Sexton v. Wheaton*, *supra*. In that case the deed to Mrs. Wheaton recited that the purchase money had been paid by her; and in disposing of the objection to the deed founded upon that fact, Mr. Chief Justice Marshall said: "The allegation that the purchase money was derived from her private individual funds, is supported by circumstances which may disclose fair motives for the conveyance, but which are not sufficient to prove that the consideration, in point of law, moved from her. It must, therefore, be considered as a voluntary conveyance, and, if sustained, must be sustained on the principle, that it was made under circumstances which do not impeach its validity when so considered." That conveyance was sustained as a voluntary conveyance by the husband to the wife—the conveyance being made through third parties, on the purchase by the husband.

The principles of law applicable to this case are very fully and clearly stated by Mr. Justice Field, as the organ of the Supreme Court, in the case of *Jackson v. Jackson*, 91 U. S. 122, 125. In that case it was held that no presumption that a personal benefit was intended to the party advancing the funds for a purchase in the name of another can arise where an obligation exists on his part, legal or moral, to provide for the grantee, as in the case of a husband for his wife, or a father for his child. "The circumstances that the

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grantee stands in one of these relations to the party is of itself sufficient evidence to rebut the presumption of a resulting trust, and to create a contrary presumption of an advancement for the grantee's benefit;" citing several well recognized cases in support of the proposition stated. The court also fully approved and adopted the principle of the case of *Sexton v. Wheaton*, *supra*, as being a well-settled principle of law.

We have examined carefully the great mass of testimony produced in the preceding case, No. 616, and by stipulation introduced into this, but we have not been able to find any evidence of a kind and force sufficient to overcome the strong presumption that the deeds to the wife were intended to convey the beneficial interest in the property to her. The evidence is, at best, but circumstantial and inferential; and much of it is wholly incompetent and inadmissible as proof; and the rest of it is too slight and inconclusive, and especially as against the sworn answer of the defendant, Susan Fletcher, to overcome the presumption in support of the deeds, as to the intention to convey the beneficial interest in the property.

Upon the whole, we must affirm the decree of the court below, dismissing the bill; and it is so ordered.

*Decree affirmed.*

On May 8, 1897, a motion for reargument was filed on behalf of the appellants.

On June 22, 1897, the motion was overruled, Mr. Chief Justice ALVEY delivering the opinion of the Court:

In this case a motion has been made on the part of the appellants for reargument or further consideration of two questions, which counsel suppose have not been sufficiently considered in the opinion heretofore delivered, to wit: first, "that the case was taken out of the Statute of Frauds by *the complete performance*, on the part of William Fletcher, of *the oral agreement between him and his wife*, relied upon by

the appellants;" and, second, "that as it had been shown that his wife, prior to the deeds in question, as well as afterwards, was his agent in financial matters, and had charge as such agent of all his property, real and personal, the presumption from this fiduciary relation would be that any property that was conveyed to her by him was to be held by her as such agent, and not in her own right." The appellants say that they do not rely upon Sec. 8 of the Statute of Frauds, relating to trusts by implication of law, but upon an express parol trust, partly performed. It is also suggested, that the case of *Townsend v. Vanderwerker*, 160 U. S. 171, has some material bearing upon these questions, and which case had been overlooked by counsel, and was not brought to the attention of the court at the argument.

Without stopping to criticise the propositions stated in the motion, for the assumptions of fact made therein, we shall not, as to the second of the questions stated, go into a further examination thereof, than is contained in the opinion heretofore filed in this case and in the opinion filed in the preceding case, both made substantially upon the same state of facts. In these opinions we have concluded, upon full consideration of the facts, that there was no such agency or fiduciary relations established, as contradistinguished from the natural and reasonable confidence subsisting between husband and wife, and their motives for mutual co-operation, the one with the other, for success in life (in this case the wife being the more saving and provident of the two), as would affect and overcome the strong presumption that the conveyances to the wife were made for her beneficial use, and not to her in trust for her husband, and his heirs at law. There is no allegation of fraud or undue influence made in the case, but the application is to have an express parol trust declared and engrafted upon the deeds to the wife, which assumes that the deeds express upon their face exactly what it was intended they should express.

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With respect to the first question suggested in the motion, that is, as to the case being withdrawn from the operation of the Statute of Frauds, because, as it is alleged, of the *complete performance*, on the part of William Fletcher, of the oral agreement between him and his wife, it may be proper for us to add some further statement of the doctrine that seems to be pertinent to the particular question suggested.

In the opinion heretofore filed, in speaking of the evidence to prove the existence and specific terms of the alleged agreement or understanding upon which the court was asked to declare the trust, we said that, in view of the character and nature of the evidence produced in support of the contention of the appellants, no case could occur that would more fully demonstrate the wisdom of the Statute of Frauds than the present. That the evidence is of the most doubtful and indefinite character; and such case as that here presented for the support of an express parol trust, falls within the cogent reasoning and vigorous language, of the late Mr. Justice Grier, speaking for the Supreme Court, in the case of *Purcell v. Miner*, 4 Wall. 517; and we are all familiar with what was there said by the learned justice, and with the result of that case. That declaration by this court, as the result of the evidence in this case to prove the contract of trust, was made upon a very full and careful examination of the proof, and we are very sure that there is nothing in the evidence that, on further consideration, would change our view of its force or effect.

There is literally no certain, clear and definite proof as to any specific contract of trust, as between husband and wife, before or at the time of the making of the deeds, and the only foundation for such contract is the inference drawn from the relation of the parties, and certain vague and indefinite statements or declarations made principally by the husband after the deeds had been made, and when he was wholly incompetent to control or affect the title vested in

the wife. Before the court can be called upon to execute or enforce a trust, it must be made entirely clear that there was a trust declared and agreed upon, and what that trust was. *Forster v. Hale*, 3 Ves. 696; Browne on Stat. of Frauds, Sec. 108. No principle of part performance, or, indeed, complete performance, by one party only, can be invoked until it be clearly and definitely shown that that there was a parol declaration of trust, and what that trust was, or required the grantee in the deeds to do, in respect of the property conveyed. The doctrine of part conveyance, to take a case out of the Statute of Frauds, is nowhere better stated than by Justice Story, in his *Equity Jurisprudence*, Sec. 764. He there says: "But in order to take a case out of the Statute of Frauds, upon the ground of part performance of a parol contract, it is not only indispensable that the acts done should be clear and definite, and refer exclusively to the contract, but the contract should also be established by competent proof to be clear, definite and unequivocal in all its terms. If the terms are uncertain or ambiguous or not made out by satisfactory proofs, a specific performance will not (as, indeed, upon principle, it should not) be decreed. The reason would seem obvious enough; for a court of equity ought not to act upon conjectures; and one of the most important objects of the statute was to prevent the introduction of loose and indeterminate proofs of what ought to be established by solemn written contracts. Yet it is certain that, in former times, very able judges felt themselves at liberty to depart from such a reasonable course of adjudication, and granted relief, notwithstanding the uncertainty of the terms of the contract. In other words, the court framed a contract for the parties *ex aquo et bono*, where it found none. Such a latitude of jurisdiction seems unwarrantable upon any sound principle, and, accordingly, it has been expressly renounced in more recent times."

But even supposing the proofs of the parol agreement or understanding alleged, to be clear, the trust being without

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writing to evidence it, is this a case for the application of the doctrine of part performance to rescue it from the operation of the Statute of Frauds? What acts of part performance, or complete performance, on the part of the grantor, in a case like the present, can be relied upon to take the case out of the statute? The mere making of the deeds, or directing them to be made to the grantee, would certainly not be sufficient; for, if so, the statute would simply be rendered nugatory and without effect. Nor will the subsequent declarations of the grantor, asserting ownership to the property, without the express and clear assent of the grantee, be admitted as evidence to affect the title of the latter; nor will the exercise of such authority or supervision over the property as a husband usually exercises over the real estate of his wife be construed into such acts of ownership as *can only be referable* to rights of his under the alleged trust. The statute is imperative and admits of no qualification. The trust must be declared in writing, or else it shall be *utterly void and of none effect*. To take the case out of the Statute of Frauds, says Chancellor Kent, the trust must appear in writing, under the hand of the party to be charged, with *absolute certainty as to its nature and terms*, before the court can undertake to execute it. Loose and general declarations of intention, by one member of a family, of holding property in trust for other members, are not sufficient for the deduction of a trust which equity will recognize and enforce. *Steere v. Steere*, 5 Johns. Ch. 1, 11; *Leman v. Whitley*, 4 Russ. Ch. 423. The authorities hold but one language upon this subject, and that is, if there be an absolute conveyance of the legal title to a supposed trustee, and there is no declaration of trust prior to or at the time of the conveyance by the grantor, and the assumed or alleged *cestui que trust* attempts to charge the grantee with a trust in respect to the land, he *must produce some writing signed by the grantee of the legal title, in order to charge him with the trust*. The objects

and nature of the trust must always appear from writing with sufficient certainty, and their connection with the subject-matter of the trust; and unless this be shown with perfect certainty and precision, the courts will not attempt to execute or enforce the trust. Express trusts of real estate can not be proved by parol; they must be, by the terms of the statute, *manifested or proved by some writing*, signed by the party to be charged with the trust. 1 Perry on Trusts, Secs. 79, 83, pages 65, 70, 71; Browne on Stat. of Frauds (3d Ed.), Secs. 105 to 109, and pages 98 to 101. And the mere refusal of a supposed trustee to execute a parol trust, or the denial of its existence, is not such a fraud as will take the case out of the Statute of Frauds, and authorize a court of equity to enforce the trust. *Scott v. Harris*, 113 Ill. 447; *Farnham v. Clements*, 51 Me. 426. To give effect to a mere parol trust in such case and on such ground, would be a virtual repeal of the Statute of Frauds, and to let in all the evils that were intended to be excluded by it.

There is no fraud or pretense of fraud alleged or attempted to be shown in the making of the deeds to the wife, nor is it alleged or shown that there was any mistake, or misapprehension of the parties as to the effect of such deeds. They are just what the parties intended them to be; and if a trust was designed at the time, there is no conceivable reason why it was not declared on the face of the deeds, or its terms reduced to writing, and not allowed to rest in mere parol. And that being the case, it is perfectly well settled, that where any important provision has been omitted from a deed, whether intentionally by the parties, or through mistake of the law as to the necessity of incorporating it in the deed, or through carelessness or inattention at the time of executing the instrument, and where no fraud is charged or proved against the grantee in the deed, who denies by his answer the existence of any such provision as that alleged to have been omitted, parol evidence

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will not be received to add to or vary the instrument. The parties will be bound by the instrument as they have actually made it, and the court will not supply defects in it. *Hunt v. Rousmanier*, 1 Pet. 1, 12 to 16; *Inham v. Childs*, 1 Bro. C. Cas. 92, 93; *Portmore v. Miner*, 2 Bro. C. Cas. 219.

The case of *Townsend v. Vanderwerker*, 160 U. S. 171, referred to in the motion, has no material application to this case that we can perceive. It was a case of a bill brought against the administrator and heirs of an intestate, alleging a verbal agreement between the intestate and the plaintiff, by which the plaintiff was to contribute one-half the cost of a tract of land and of a dwelling house to be erected thereon, and the intestate, after entering on the property, was to convey to him a half interest therein; and the bill set forth, and the proof showed clearly, the full performance of the contract on the part of the plaintiff, by the expenditure of his money, and his personal supervision and assistance in the erection of the dwelling house on the land as required by the contract, and that the intestate never questioned that the plaintiff had paid his half in full, but stated to him and to mutual friends that he had paid in full, and was jointly interested with her in the premises; that his ownership of half of the premises was never disputed by her, but was openly recognized, and that, when he requested a settlement and that she convey his half to him, she replied that she had provided for that in her will, by which she gave him the entire property. This, as is manifest, was but a contract for the sale and conveyance of land upon valuable consideration; and the Supreme Court held that it could be specifically executed upon the application of the doctrine of part performance. It was not a case of an express parol trust, as this is alleged to be, arising under the seventh section of the Statute of Frauds, where the attempt is to engraft such parol trust, without the aid of writing, upon absolute deeds, making no reference to such trust, and that, too, against the sworn answer of the defendant making posi-

tive denial of the existence of such trust. No reliable authority for this has been produced.

The case of *Haigh v. Kaye*, 7 Ch. App. 469, was much relied on at the argument, as tending to support the contention of the appellants. But that case, though extreme in some of its features, and especially in some of the judicial reflections indulged in, does not appear to be at all applicable to this case. That was a case between a party and his brother-in-law, and where by the falsity of the consideration recited in the deed, and the fraudulent conduct of the defendant, *an implied or resulting trust was raised*; the defendant *expressly admitting in his answer that he had paid no consideration for the property*, and that, "he took the property upon the most positive agreement to return it." In that case, the plaintiff conveyed an estate to the defendant by deed, in which the estate was expressed to be conveyed absolutely in consideration of a sum of money paid by the defendant. But no purchase money was actually paid, and the plaintiff alleged that he conveyed the estate to the defendant as trustee for himself. The defendant, in his answer, admitted that he gave no consideration for the property conveyed, but stated that the plaintiff made the conveyance, fearing that an adverse decision would be made against him in a suit then pending in chancery; and that it was understood that the defendant should account to the plaintiff for the rents until he could make arrangements for paying the purchase money; and if no such arrangement could be made, that he should reconvey the estate. In the answer, the admission of the defendant was stated in these terms: "I admit that it was intended that I should convey the estate to the plaintiff when he should desire me to do so, unless arrangements were completed for the purchase or payment of the purchase money by me, and that in the meantime I should, until such arrangements were finally made, account to the plaintiff for the rents and profits of the property." The trust was thus admitted in writ-

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ing, which, according to the authorities, was sufficient evidence of its existence under the statute, and authorized the court to enforce it. *Hampton v. Spencer*, 2 Vern. 288; *Cottingham v. Fletcher*, 2 Atk. 155; *Maccubbin v. Cromwell*, 7 G. & J. 157. But, notwithstanding the arrangement or agreement thus admitted, the defendant claimed to hold the estate discharged of any trust, and claimed the benefit of the Statute of Frauds. But the court held, that the defendant had failed to maintain the defense set up by him, to wit, the illegality of the purpose for which the conveyance was made, and therefore the decree below was right in declaring that he should be treated as trustee of the property, and should convey it to the representatives of the original plaintiff. That case, clearly, has no application to the present case.

The motive or reason that actuated the grantor in making the deeds, or causing deeds to be made to his wife, is not a matter to be considered or controlled by the court. He had a perfect right to make the deeds, and to dispose of his property as he thought proper. If the disposition had been made by will, there could have been no question of the right, and the right equally existed to make a settlement to operate *inter vivos* as a disposition to operate only after death.

*Motion overruled.*

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 BANVILLE v. SULLIVAN.
 

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PRACTICE; ATTACHMENT AND GARNISHMENT; INTERROGATORIES,  
FILING OF.

A garnishee in default in answering interrogatories served upon him with a writ of attachment or garnishment, may answer the interrogatories at any time before proceedings are had upon his default, and leave of court is not necessary to enable him to do so; especially where the writ is in aid of the execution of a decree in equity.

No. 654. Submitted April 9, 1897. Decided April 26, 1897.

HEARING on an appeal by a garnishee from a judgment

of condemnation, in proceedings by way of attachment or garnishment issued by way of execution in a suit in equity.  
*Reversed.*

The COURT in its opinion stated the case as follows :

This is an appeal by a garnishee, Catherine Banville, from a judgment rendered against her in the Supreme Court of the District of Columbia under a writ of attachment or garnishment issued by way of execution in a suit in equity in said court, wherein the appellee, John P. Sullivan, was complainant, and one Frank Mace and others were defendants. There was a decree in this equity suit for the payment by Mace and another defendant to the complainant, Sullivan, of the sum of \$400, with interest thereon from a certain specified day, and for execution therefor as at law.

Upon this there was a writ of attachment issued on June 22, 1896, which was on the same day served by the marshal on three several persons, one of them being the appellant, Catherine Banville. What the result was of the service upon the other two parties does not appear from the record before us, and we presume it is not important in this proceeding. Catherine Banville made answer to the interrogatories served upon her with the writ, although not until August 20, 1896, nearly two months after the date of the service of the writ, notwithstanding that a rule of the court, a copy of which was served upon her with the writ, required that the interrogatories should be answered within ten days after such service; and her answer was to the effect that she was not indebted to the defendants, or either of them, and had no goods, chattels or credits of the defendants, or either of them, in her possession, either at the time of the service of the writ or at any time between that date and the time of answering. It seems that ten days after this she filed some affidavits apparently intended to explain or excuse her delay in answering.

No action, however, had been taken by the appellee to

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## Argument of Counsel.

enforce the default of the appellant; nor was there any such action, or apparently any further action of any kind by any of the parties until December 19, 1896, when the appellee moved for judgment of condemnation against the garnishee, the appellant here. The motion was allowed by the court, and on January 5, 1897, judgment was rendered against the appellant for the whole amount found due by the decree, and execution was awarded against her as at law. From this judgment the garnishee appealed.

*Mr. Henry E. Davis* for the appellant:

At common law, a judgment by default could not be taken by a plaintiff who rested upon his right to such judgment until after plea pleaded or other step taken by a defendant in opposition to the claim of the plaintiff. 1 Tidd's Pr. 566-568; *Minns v. Baxter*, 1 T. R. 16; *Sherston v. Hughes*, 5 T. R. 35. The principle underlying is, that by resting on his rights the plaintiff is held to have tacitly assented to an extension of the time within which the defendant might take the proper step, and also to waive his right to claim judgment by default against the defendant, and thereby permit the defendant to take the proper step at any time before judgment was actually applied for, and is also guilty of such laches on his own part as to disentitle him to take advantage of the defendant's neglect. 1 Tidd's Pr., Id., and cases cited under the paragraph next following:

This principle has been uniformly recognized in the modern practice, whether at common law, or in equity, or under codes and statutes. *Castle v. Judson*, 17 Ill. 381; *Cook v. Forrest*, 18 Ill. 581; *Corbin v. Turrell*, 20 Ill. 516; *Mason v. Abbott*, 83 Ill. 445; *Pett v. Clark*, 5 Wis. 198; *Hurlock v. Reinhart*, 41 Tex. 580; *Railroad Co. v. Scott*, 66 Tex. 565; *Hill v. Supervisors*, 10 Oh. St. 621; *Walker v. Tiffin Co.*, 2 Colo. 89; *Manville v. Parks*, 7 Colo. 128; *Sieber v. Fruck*, 7 Colo. 148; *King v. Hicks*, 32 Md. 460; *Gill v. Woodfin*, 25

L. R. Ch. Div. 707; *Woosley v. Memphis Co.*, 28 Ala. 536; *Bingham v. Morris*, 7 Cr. 99; *Redfield v. Miller*, 59 Iowa, 393.

Applying the principle to this case, the fact is seen to be that although the appellant was actually in default after the service upon her of the writ of attachment, the appellee yet neglected to take advantage of the default and made no attempt to do so until after the appellant had answered in due form, showing that she had nothing in her hands subject to satisfaction of the decree in favor of the appellee. Under the circumstances, the appellant thus appearing to have a perfect defense on the merits, it was error to give judgment of condemnation in favor of the appellee, who had slept upon his rights, and so, being guilty of laches, was *in pari delicto* with the appellant.

*Mr. James A. D. Richards* and *Mr. Lorenzo A. Bailey* for the appellee:

1. The time limited by the rule of court for the garnishee to answer expired ten days after service of the interrogatories upon her. Upon the expiration of twenty days, exclusive of Sundays and legal holidays, after such service, the right of the plaintiff to judgment of condemnation was absolute, and by the terms of the rule he could claim it "at any time" thereafter, as of course. The statute is mandatory, containing no exceptions and leaving nothing to the discretion of the court in such case. Maryland Act of 1795, Ch. 56, Sec. 5; Common Law Rule No. 86, Supreme Court, D. C.

The limitation of time was binding upon the court as well as upon the garnishee. The rule of court has the force of law. The court had no power to extend the time for answering, or to excuse failure to answer, within the time limited by the rule. *Wall v. Wall*, 2 H. & G. 79, 81, 82; *Thompson v. Hatch*, 3 Pick. 512, 516; *Tripp v. Brownell*, 2 Gray, 402; *Coyote Co. v. Ruble*, 9 Oregon, 121; *Hughes v. Jackson*, 12 Md. 450, 463. Where the legislature makes a

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plain provision, without making any exception, the courts can make none. *French v. Spencer*, 21 How. 228; *Yturvide v. United States*, 22 How. 290.

2. If the court had such power, the decree appealed from is in itself a denial of any extension of time to the garnishee and a refusal to accept her excuse for delay, and such denial and refusal, being in the exercise of judicial discretion, is not appealable. *Smith v. Brown*, 5 Cal. 118.

3. If the court had such power and had been called upon to exercise it, the record shows this to be a proper case to deny such application. *Anderson v. Graff*, 41 Md. 602; *Fifield v. Wood*, 9 Iowa, 249; *Boyd v. Canal Co.*, 17 Md., 195; *Burch v. Scott*, 1 G. & J. 393, 426. Ignorance on the part of a garnishee of the necessity of appearing in court and contesting an attachment, affords no sufficient ground for striking out the judgment of condemnation. Shinn on Attachment, Sec. 699; *Friedenrich v. Moore*, 24 Md. 295, 307.

4. The failure of the garnishee to answer within the time limited is an admission of assets, and the plaintiff's right to judgment of condemnation is then absolute, unless he waive it. *Powder Co. v. Railroad Co.*, 63 Md. 76. Sullivan never waived his right. A waiver, to be binding, must operate by way of estoppel or be supported by a valuable consideration, and must be an intentional act. 28 A. & E. Enc. 531, and note 1; *Id.* 527, and note 1.

5. Sullivan was not bound to notice an answer not filed in time. A paper filed after the time prescribed by law, and without leave of the court, will not be considered by the court and should be treated as a nullity. 87 U. S. 264.

Mr. Justice MORRIS delivered the opinion of the Court:

The affidavits filed by the garnishee in the court below on August 27, 1896, are not made part of the record in any way to require consideration from us, and must therefore be disregarded on this appeal. They are not noticed by the court below either in its judgment or otherwise; and

consideration of them is not required for the determination of the question before us.

That question is, whether in proceedings in attachment or garnishment by way of execution, when the answer of the garnishee to the interrogatories and writ served upon him has not been filed within the time limited by the statute or by the rules made in pursuance of the statute, such answer can validly be filed at any time afterwards before proceedings are had upon the default, and should thereupon, even though no consent of court has been sought or had for its filing, be considered by the court as though it had been filed in due time. This question we find ourselves compelled to determine very differently from the court below.

That pleadings should be filed in due time; that all proceedings required to be had in court should be taken in proper season; that rules of practice limiting time should be enforced with reasonable strictness, and that excuses for the neglect or disregard of such rules should not be lightly entertained, is the demand of good order and of justice, for the proper administration of which such limitations have been prescribed. For without such limitations the due administration of justice would become impossible; and without the enforcement of such limitations only disorder and confusion would result, and the authority of the courts would fall into contempt.

Some of these limitations are of a jurisdictional character—such as the statute of limitations itself in some cases, the provisions for taking appeals, the rules regarding motions for new trials and in arrest of judgment, and other regulations, whether prescribed directly by statute, or by rules of court having the force of statutory provision, which might readily be cited; and when they are of such a character, they are a law unto the courts themselves as well as to litigants, and may not be disregarded in special cases even for assumed hardship—although, of course, there are cases where parties may be estopped by their own conduct or

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course of action from seeking the enforcement even of limitations of a jurisdictional character.

But where causes are pending in a court undetermined, and especially where a proceeding is in its nature a matter of absolute right, such as pleadings usually are, apart from the limitations by which it is required that they should be guarded, it has never yet been heard, either under the common law in England, or in the State of Maryland, from which we have derived our practice, or in the District of Columbia itself during the period of nearly one hundred years of its separate judicial existence, that parties may not waive limitations of time either by their express consent or by implication, through failure to take advantage of default.

This position does not seem to be controverted by the appellee; although the argument on his behalf would tend to question its correctness. The contention seems to be that there is something exceptional in the law of garnishment or in the rules of court relating thereto that precludes the application to it of the well established practice in other cases. It is argued that, although an answer in equity or a plea at common law may be properly filed, even without leave of the court, at any time after the rule day for filing such answer or plea, yet an answer to interrogatories propounded with a writ of garnishment may not be so filed, whether default has been taken or not, and whether leave of the court has or has not been asked.

We fail to find anything exceptional in the law of garnishment or in the rules of court made in pursuance of it and to give it effect, that would warrant this contention. Nor do we find anything in the authorities cited on behalf of the appellee that would have that effect in opposition to the well established practice in this District in all such cases.

Attachments by way of execution upon judgments were authorized in Maryland by the act of Assembly of that State of 1715, Ch. 40, Sec. 7. The provision of that act is that, if the garnishee does not show cause to the contrary on the

day of the return of the writ, or shall not then appear, "the court shall and may condemn the goods, chattels or credits attached." No formal interrogatories were provided by that act to be exhibited to the garnishee and answered by him. But the act of Assembly of the same State of 1795, Ch. 56, the principal purpose of which seems to have been to authorize the issue of writs of attachment by way of mesne process, provides in its fifth section that "in all cases of attachments it shall and may be lawful for the plaintiff to exhibit interrogatories in writing to the garnishee aforesaid, who shall, by rule of court, answer each and every of the interrogatories touching or concerning the property of the defendant, in his possession or charge, or by him due or owing, at the time of serving of such writ of attachment, or at any other time; and if such garnishee shall neglect or refuse so to do, the court is hereby directed to adjudge that such garnishee hath in his possession property of the defendant, or is indebted to such defendant, to an amount and value sufficient to pay the debt, damages and interest of said plaintiff, and costs, and execution shall issue as in other cases of condemnation in the hands of garnishees."

These acts are in force in the District of Columbia, and they are the acts under which the proceedings in the case before us have been sought to be had.

The act of 1795, it will be noticed, contemplates the formulation of a rule of court for its enforcement; and the rule for that purpose promulgated by the Supreme Court of the District of Columbia, and in force at the time at which these proceedings were instituted, and at the present time, is the following:

"The plaintiff, upon issuing such writ of attachment (attachment on judgment), may exhibit interrogatories to be answered by the garnishee within ten days after the service of the same upon him; and upon his failure to answer, judgment may be entered against him at any time after the twentieth day, exclusive of Sundays and legal holidays, oc-

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curing after the service of said attachment upon him for the full amount of the judgment.

"If by the answer of the garnishee, or by the verdict of a jury, it shall appear that he has property of the defendant, judgment of condemnation of said property or credits shall be entered, but not for an amount in excess of the original judgment and the costs, and execution shall issue thereon."

These statutes and the rule of court made in pursuance of them, are no more mandatory or imperative than other similar rules and statutes which have been invariably held to be merely authoritative, and not imperative, except at the option of the party seeking the exercise of the authority and entitled to have it exercised in his favor. The ordinary rules for the regulation of the time of pleading are couched in similar and even more imperative language, and have equally the sanction of statute for their formulation. And yet it has been, as we have stated, an unheard of thing in the courts of the District of Columbia, that parties in default as to the time of pleading might not plead freely and without leave except as to certain pleas regarded technically with disfavor, at any time thereafter until some action has been had against them to enforce such default. The invariable practice has been that, notwithstanding the lapse of time limited by the rules of court, pleas may be filed and should be received at any time, until default taken. And this practice, which is plainly in no way inconsistent with the purposes of justice, we regard as so well established that citation of authorities in support of it may be regarded as wholly unnecessary. But reference may be had to 1 Tidd's Practice, 566; *King v. Hicks*, 32 Md. 460; *Crabtree v. Green*, 36 Ill. 279; *Bowers v. Dickerson*, 18 Cal. 420; *Dole v. Young*, 11 Johns. (N. Y.) 90; *Boyd v. Canal Co.*, 17 Md. 195.

This is the rule and the practice at common law. Much more is it and should it be the rule and the practice of

equity, from which the maxim has been derived that time is not of the essence of contracts, which does not favor the infliction of forfeitures or defaults, and of which a great distinguishing feature is discovery, and not default or the infliction of penalty. And the present proceeding, although legal in its character and statutory in its origin, it must be remembered, is sought to be conducted in a court of equity, the power of which over its own process is so much greater than that of a court of common law. And this is merely a process to enforce satisfaction of a decree in equity for the payment of money.

It is no objection that the appellant did not obtain leave of court to answer the interrogatories. If the appellee's contention that the statute and the rule are so imperative that the garnishee's answer, if not filed within the specified time, could not be filed at all, were correct, application to the court would be useless, for the court would have no authority to extend the time, the statute and the rule both being silent on the subject. If, on the other hand, the statute and the rule are not thus imperative, there was no necessity to apply to the court, for there was nothing in the record to interpose any obstacle to the answer. Application to the court for leave to interpose some pleading or proceeding is proper only when the court has discretionary power to grant it, and when there is no imperative statute or rule of court to preclude its allowance; and it is necessary only where there has been already some pleading or proceeding by the party applicant inconsistent with that proposed by the application to be had; as, for instance, pleading over after a demurrer has been interposed and overruled; or when it is anticipated that the adverse party may proceed to enforce default in the absence of action by the court. The court in such cases does not move of its own accord; nor is there any peremptory requirement of law that it should do so. Only upon the application of an adverse party is default enforced under our practice, and it is always

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in the power of such party to enforce it, and to enforce a strict compliance with the rules by prompt action on his part. If he fails to take such action, to the extent of his failure he waives his right, and is held tacitly to consent to the enlargement of the time within which his opponent may act. The limitation of time is for his benefit as well as for the benefit of all litigants in his situation. If he chooses to waive it, as he may do either tacitly or by express agreement, there is nothing either in the statute or in the rule of court, or in the policy of the law, that would prohibit such waiver on his part. The statute or the rule might have been made mandatory in the sense and to the extent claimed for them by the appellee; and apt words might readily have been used for that purpose. But there are no such words; and there would be no good purpose to be subserved by their insertion.

It is argued, also, on behalf of the appellee, that a garnishee's answer to interrogatories is evidence, not pleading, in favor of which position the case of *Devries v. Buchanan*, 10 Md. 210, is cited; and that, therefore, the practice applicable to pleadings does not apply to answers to interrogatories. We see no reason to question the correctness of the statement in the case of *Devries v. Buchanan* in the sense and in the connection in which it was made, but it does not support the conclusion sought to be drawn from it by the appellee. For it is not of the slightest consequence in this connection whether we designate an answer to interrogatories as a pleading or as a matter of evidence; it is in any event a proceeding in court for the introduction of which there is a limitation of time by a rule of court, and with reference to which no good reason has been or can be suggested that would distinguish it from any other proceedings so limited so far as to preclude a party in default from repairing his default at any time before action thereon is had against him, or to preclude the opposing party from waiving the default by his inaction.

Nor do we find any force in the argument that the failure of the garnishee to answer in due time is an admission of assets in his hands. Failure to plead or answer in any case is equally an admission of the justice of the claim with reference to which the default has been had, and of the claimant's right to judgment thereon in his favor. Yet, in view of what we have seen to be the uniform practice on the subject, such tacit admission, although a sufficient basis upon which the opposing party may act, if he chooses to act, is not such as to preclude denial of liability by plea or answer interposed after the lapse of the time limited and before action taken on the default.

Opposed to the doctrine sustained by our practice are supposed to be certain decisions cited on behalf of the appellee from Georgia and Louisiana, and also from Iowa and Illinois. But these decisions wholly fail to sustain the appellee's contention.

The case of *Whiteside v. Tunstall*, 17 Ill. 258, which is one of those cited in this connection, merely holds that default is an admission of indebtedness—a doctrine which no one controverts. The case of *Scamahorn v. Scott*, 42 Iowa, 529, holds that a motion to set aside a judgment of default for failure to answer a writ of attachment must be made at the same term at which the default was taken. The case of *Bearden v. Metropolitan Street R. Co.*, 82 Ga. 605, held that, when there was a writ of garnishment returnable to a certain term of court, and no answer to it was then filed, and another term several months afterwards supervened and there was even then no answer, and the plaintiff in the suit moved for judgment, and the court without cause refused to allow the motion or to enter judgment, and on the contrary gave the counsel for the garnishee, in the words of the record of the case, "further time to look into the matter," and still no excuse was given for the delay in answering, but there was an answer afterwards filed by the garnishee, and a motion to strike it out and to enter judgment was refused

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by the court, this was error. In fact, if there had been any discretion in the court when the first motion for judgment was made, its action might perhaps be characterized as savoring of an abuse of such discretion. But plainly this case gives no countenance to the appellee's theory that, if the garnishee fails to answer within the time limited, he cannot answer at all, and his default is a conclusive admission of assets of the defendant in his hands. On the contrary, it is quite plain from a careful reading of the case, and from the other cases in the same State cited in the opinion, that the court could for good cause shown enlarge the time for answering, which it could not do if the statute were of the peremptory character claimed for it. Moreover, we are not advised how far the attachment laws of the State of Georgia, upon which that opinion was based, are conformable to the laws in force in the District of Columbia.

Four cases from Louisiana are cited. One of these, the case of *Foley v. Harrison*, 5 La. Ann. 82, has no bearing whatever on the subject. In another, that of *Sturges v. Kendall*, 2 La. Ann. 565, it is held that the forbearance of a plaintiff to take judgment against the garnishee at the same time that he takes it against the principal defendant, is no bar to his taking judgment subsequently against the garnishee. In the case of *Henry v. Bryce*, 11 La. Ann. 691, it is held that if a married woman does not answer interrogatories within the time limited, default may be taken against her, notwithstanding her disability of coverture. And in the fourth and last case cited, that of *Warren v. Copp*, 48 La. Ann., cited from 19 Southern Reporter, p. 746, it was held that where a garnishee was negligent in answering interrogatories, the negligence of a messenger being imputed to him, and permitted judgment to be entered against him, he could obtain no relief from the judgment.

It is difficult to see how any of these decisions can be construed to support the contention of the appellee. Of course, after judgment entered, or default taken, or even proceed-

ings had looking to that end, liabilities become fixed, and parties in default can have relief only for good cause shown. But that is a proposition universally accepted; and the decisions cited add nothing to its force for us. Those decisions fail utterly to touch the question of the right of a garnishee to answer, without special leave of court, the interrogatories propounded to him, at any time before there is any proceeding or motion to enforce his default. That question we regard as fully settled by our invariable practice for more than a hundred years in all other similar cases.

Reference is also made to the case of *McPhaul v. Lapsley*, 20 Wall. 264 (cited as 87 U. S.), which arose under the laws of the State of Texas. In those laws was the following provision: "Every instrument in writing (properly recorded) shall be admitted as evidence without the necessity of proving its execution, provided that the party who wishes to give it in evidence shall file the same among the papers of the suit three days before the trial and give notice to the opposite party of such filing, and unless such opposite party, or some other person for him, shall within one day after such notice file an affidavit stating that he believes such instrument to be forged." In the case cited an affidavit had been filed, not within one day after notice given, but about twenty days afterwards, while the trial was in progress, and had been filed on behalf of a stranger to the record; and it was held that it was proper wholly to disregard such affidavit. That decision has no bearing on the case before us. The statute was a specific provision intended to facilitate the introduction of evidence; and to allow a departure from its terms, which would have the effect of operating as a surprise upon the opposing party, would be contrary to the elementary principles of justice.

We have thus carefully examined the authorities cited in behalf of the appellee in this case, for the reason that the judgment entered against the garnishee in the court below is a radical departure from the practice heretofore prevalent

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in all such cases, and would have the effect of establishing an entirely new practice. We find no good reason for such departure, and no good purpose to be subserved by it in the administration of justice. Parties have it in their own power to proceed promptly to enforce defaults; but as long as they fail so to proceed, it is in the interest of justice that those in default should in the meantime be allowed to come in and remove the default.

From what we have said it follows that the order, judgment, or decree appealed from, whichever it be regarded, must be, and it is hereby, *reversed, with costs. The cause will be remanded to the Supreme Court of the District of Columbia with directions to vacate such order, judgment, or decree, and to overrule the complainant's motion for judgment, and for such further proceedings in the premises according to law as may not be inconsistent with this opinion. And it is so ordered.*

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BROWN

v.

THE WASHINGTON AND GEORGETOWN RAILROAD  
COMPANY.

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STREET RAILWAYS; PASSENGERS; NEGLIGENCE; APPELLATE PRACTICE; REVERSIBLE ERROR.

1. It is not *prima facie* negligence for a person to attempt to board a horse car, however slowly moving, for the purpose of becoming a passenger.
2. On an appeal the court cannot consider the question of the preponderance of evidence.
3. Where in a charge to the jury it appears that the trial court was not merely commenting upon the evidence, but peremptorily instructing the jury in terms which left them no option but to return the verdict they rendered, and such instructions are erroneous, the error is reversible error.

No. 800. Submitted April 14, 1897. Decided April 27, 1897.

HEARING on an appeal by the plaintiff from a judgment

on verdict for the defendant in an action to recover damages for death by wrongful act. *Reversed.*

The COURT in its opinion stated the case as follows:

This is an appeal from a judgment of the Supreme Court of the District of Columbia, rendered in an action instituted in that court by the appellant, Ruth F. Brown, as administratrix of her deceased husband, J. Warren Brown, against the appellee, the Washington and Georgetown Railroad Company, for the death of her said husband through the alleged negligence of the railroad company.

It was claimed by the appellant in her declaration that, on June 28, 1892, the deceased, J. Warren Brown, attempted to board one of the defendant's cars for the purpose of becoming a passenger thereon, at the corner of Eleventh street and Pennsylvania avenue, northwest, in the city of Washington; and that while he was in the act of getting into or upon the car, it was suddenly started by the driver, and the deceased was thereby thrown to the ground and sustained serious injuries, which resulted in his death in the following October.

The testimony is in some respects quite conflicting; but that adduced on behalf of the appellant tended to show that the deceased—who, it seems, was a man of about 65 years of age and weighed about 175 pounds—about half-past four o'clock on the afternoon of the day before mentioned, proceeded from the sidewalk at the corner of Pennsylvania avenue and Eleventh street, and signalled an eastbound car of the railroad company for the purpose of becoming a passenger thereon; that the driver of the car, upon perceiving him, the cars at that time being drawn by horses, applied his brakes, and slowed up his car, which, however, he did not entirely stop; that, while the horses were going no faster than a walk, the deceased, who had crossed the north track of the railroad in front of another car moving in the opposite direction, placed his foot on the step and took hold with

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his hand of the rail or upright stanchion of the car; that at that moment the driver suddenly released his brake and started the car with a jolt; and that by the sudden impulse the deceased was thrown from the car to the ground, and thrown against the westbound car, and was fatally injured.

There is testimony on the part of the defendant tending to show that the driver had not slowed the speed of his car at all; that there was no sudden release of the brake and no sudden jolt; that the deceased had an umbrella, or a package, or a paper in his hand, which left him but the use of one hand, and consequently, left him less capable of boarding the car in safety; and that his attempt to board the car was made while the car was moving at its usual rate of speed, and before it stopped or had time to stop for him to enter.

Upon this condition of the testimony counsel for the plaintiff requested the following instructions to be given to the jury, which was refused:

"If the jury find from all the evidence that on the 28th day of June, 1892, the plaintiff's intestate, intending to become a passenger on one of the defendant's cars on Pennsylvania avenue, between Eleventh and Twelfth streets, northwest, in this city, signalled to the driver of said car to stop when the car was at such a distance from the plaintiff's intestate that said car could have been stopped by the time it reached the point where the decedent was standing, but that instead of stopping his car the driver simply slowed the same up, and the plaintiff's intestate attempted to board the said car while it was slowly moving, and while in the act of getting upon said car, and before getting entirely on the car, the driver of said street car released his brake and started the same forward, and thereby the plaintiff's intestate was thrown to the ground and sustained injuries which resulted in his death, and if the jury find from all the evidence that in approaching said car and attempting to board the same under the circumstances, the plaintiff's intestate

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acted as a reasonably prudent and careful man would have acted under the same circumstances, and that the driver of said street car started his car forward before the plaintiff's intestate, in the exercise of reasonable care on his part, could have entered onto or into the same, and that by reason of this starting his car forward the plaintiff's intestate was thrown from said car and injured, and if the jury further find from all the evidence that the act of the driver in thus starting the car forward was negligent, and that this negligence was the proximate and direct cause of the injury to the plaintiff's intestate, then the jury shall find for the plaintiff."

Two instructions were requested on behalf of the defendant, which were granted. They are as follows:

"1. If from the whole evidence the jury shall find that the deceased attempted to board the moving car, such attempt was an act of negligence on his part, and was not excused by the fact, if the jury shall find the same, that he had signalled the car to stop and it had not done so. In making the attempt the deceased took the risk of his own physical incapacity, and also of the usual and ordinary movements of the car, including the movement caused by the release of the brake, if the jury shall find that the same occurred, and that it was usual and ordinary and without negligence on the part of the driver—that is to say, without knowledge or notice by him of the deceased's position of peril—and if the jury shall find that by reason of such attempt, and not through the negligence of the defendant or its agents, the deceased fell, or was thrown from the car and thereby fatally injured, the plaintiff is not entitled to recover.

"2. If from the whole evidence the jury shall find that the deceased attempted to board the car when in motion, he took all the risks incident to such attempt, and it matters not that he made such attempt in consequence of the failure of the car to stop in response to a signal, if the jury shall

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find that the same was given. If such attempt was unsuccessful, and in consequence the deceased was fatally injured, the plaintiff is not entitled to recover in the absence of negligence on the part of the defendant or its agents, and in order to charge the defendant with such negligence it must be shown to the satisfaction of the jury, by a preponderance of evidence, that the driver, the agent of the defendant, had knowledge of the perilous situation of the deceased when he attempted to board the car, and had time and opportunity to prevent injury to him, and instead of so doing caused the injury to him by the release of the brake."

Exception was duly taken to the action of the court in regard to these several instructions, as also to various portions of the charge, which thereafter the court of its own motion gave to the jury, notably the following:

"I tell you that it is a negligent act for any person to attempt to board a moving car."

"It appears to me that it is perfectly plain that the driver of this car had no reason to expect that the plaintiff would board the car while it was in motion."

"If from the whole evidence the jury shall find that the deceased attempted to board the moving car, such attempt was an act of negligence on his part and was not excused by the fact, if the jury shall find the same, that he had signaled the car to stop and it had not done so."

Under these instructions, the jury returned a verdict for the defendant; and from the judgment rendered thereon the plaintiff appealed.

*Mr. Geo. E. Hamilton* and *Mr. M. J. Colbert* for the appellant.

*Mr. Enoch Totten*, *Mr. W. D. Davidge* and *Mr. Howe Totten* for the appellee.

Mr. Justice MORRIS delivered the opinion of the Court:

There is but one question for us in this case; and that question is no longer an open one. It is, whether, under any

and all circumstances, an attempt to board a street car drawn by horses, however slowly moving, for the purpose of becoming a passenger thereon, is an act of negligence in law on the part of the person making the attempt, such as to preclude him or his representative from recovery against the railroad company owning and operating the car, if he has been injured in the attempt by the alleged negligence of the agents of the railroad company. The answer to this question has been conclusively settled in the negative both by reason and the great weight of authority. This was fully admitted in the argument for the appellee; and we are therefore saved the necessity of discussion of the subject and of the citation of authorities upon the question. And it follows, necessarily, that there was plain and palpable error in this case, both in the charge given by the court to the jury and in the instructions requested on the part of the appellee and granted and emphasized by the court, as also in the refusal to give the instruction requested on behalf of the plaintiff.

But it is argued that, in a legal sense, the plaintiff was not harmed by the error; and for this contention two grounds are assigned. The first is, that the presiding justice, in the statements to which exception was taken, was only commenting on the evidence, as he had a right to do, and after all left it to the jury to determine whether the deceased was negligent. And the second ground is, that in view of the preponderance of the testimony in favor of the defendant, the verdict is right anyhow, and should not be disturbed.

But we have nothing to do with the preponderance of evidence; and this second consideration, therefore, can have no weight. Nor is it apparent that the other justification for the charge and instructions given has any greater merit. It is very plain that the presiding justice was not commenting on the evidence, but peremptorily instructing the jury in terms which left them no option but to return the verdict which they rendered. Nowhere does he tell them that it

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was for them to determine, whether, under the circumstances of the case, it was negligence on the part of the deceased to attempt to board the moving car; and yet that was a question to be determined by them under proper instructions from the court. On the contrary, he distinctly removed that question from their consideration; and it was left them to determine only whether there was any negligence on the part of the agents of the railroad company supervening after discovery by them of the perilous position of the deceased.

It is not always negligence either in law or in fact for a person to attempt to enter upon or to alight from a moving car propelled by the greatly more dangerous agency of steam. And we know that, upon these street cars, when drawn by horses, it was not at all an unusual thing, permitted and even encouraged by drivers and conductors, for persons to get on and off the cars while in motion, the cars being merely slowed up for the purpose and not stopped. When circumstances, therefore, are shown, from which it may reasonably be inferred that such attempts are sanctioned by the railroad company, or are not inconsistent with the usual course of action of ordinarily prudent persons, it is for the jury, and not for the court, to determine whether there was negligence. And it is certainly error to instruct a jury, as was practically done in this case, that under no circumstances could such an attempt be excused from the charge of negligence.

We are of opinion that the judgment appealed from should be reversed, with costs, and that the cause should be remanded to the Supreme Court of the District of Columbia, with directions to vacate the verdict of the jury and award a new trial. And it is so ordered.

## THE UNITED STATES v. PUMPHREY.

## BONDS EXECUTED TO UNITED STATES; TRIBAL INDIANS.

A bond voluntarily executed to the United States conditioned upon the faithful performance of a contract with a number of tribal Indians, whereby the Indians were temporarily employed by the obligors, who contracted among other things to pay them monthly salaries, to provide them with proper food and raiment, and to return them to the Government agency within a specified time without expense to the United States, is a valid and binding obligation, although not authorized by statute; and for breaches of its conditions the United States can recover not only for the expense the Government may have incurred in returning the Indians to the agency, but for the amount due the Indians for nonperformance of the contract, as the seal of the instrument imports a consideration, and an action thereon could not be maintained at law except in the name of the obligees.

No. 634. Submitted April 8, 1897. Decided April 23, 1897.

HEARING on an appeal by the United States from a judgment sustaining a demurrer to a declaration in an action upon a bond. *Reversed.*

The COURT in its opinion stated the case as follows:

The United States have appealed from a judgment of the Supreme Court of the District of Columbia rendered against them in an action upon a bond. The declaration, to which a demurrer was sustained, sets out the following facts, substantially:

1. Defendant, James W. Pumphrey, together with William L. Taylor and Augustus Davis, Jr., on August 21, 1894, signed, sealed and delivered the bond, wherein they acknowledged themselves to be indebted to the plaintiffs in the sum of \$5,000.
2. The condition of the bond was the faithful performance of certain contracts made by said William L. Taylor, with

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## Statement of the Case.

the consent and express approval of the Commissioner of Indian Affairs, with certain Indians, male and female, named in the bond as follows: Eagle Voice, Black Hawk, At the Straight, Running Bear, Blue Bird, Cyrus Stone, Holy Bird, Case Knife, Clement Whirlwind Soldier, Duck, Mrs. Black Hawk (Red Woman), Columbia Crazy Cat, Jumper, Emma Blue Bird, and Arrow Side.

3. These Indians belonged to the Rosebud Agency, South Dakota, and were engaged to accompany said Taylor and form a part of a "Wild West Show" which he proposed to exhibit throughout the country.

4. The contracts are set out in the declaration, and appear to have been formally executed by the parties respectively and approved by the Indian agent.

5. In consideration of the services of the said Indians, said Taylor agreed to pay them a monthly salary from the date of departure from the agency until return thereto; the payment for the last month to be paid after the return of the Indians to the agency, and in the presence of the Indian agent. He further agreed to provide them with proper food and raiment, and to discharge all traveling and needful incidental expenses during the said time; to protect them from immoral influences and surroundings; to provide all medical attendance and medicine; to do all things requisite and proper for their health, comfort and welfare, and to return them to the agency within the time specified by the Department of the Interior without charge or cost to them or to the United States.

6. The said contracts and bond having been approved by the Commissioner, the said Indians departed from the agency August 21, 1894, and remained away, in the performance of their obligations, until April, 1895.

7. The said Taylor did not perform his contract as stipulated. He failed and refused to pay the salaries contracted for and to discharge their traveling and needful incidental expenses, and to furnish them proper raiment.

## Argument of Counsel.

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He further failed to provide them with the necessary means to return to their said agency, and the United States were compelled to return them and to pay all the cost of their transportation from Louisville, Kentucky, to said agency.

8. The sums due the said Indians for wages and damages amount to \$2,800, and the amount expended for them by the United States as aforesaid was \$434; and of these recovery is prayed.

*Mr. Henry E. Davis*, U. S. Attorney for the District of Columbia, for the United States:

1. The United States have an interest in the subject matter. Section 463, Revised Statutes, provides that: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." See *The Cherokee Nation v. Georgia*, 5 Pet. 17; *United States v. Kagama*, 118 U. S. 383; *Choctaw Nation v. United States*, 119 U. S. 1.

2. The United States are competent to contract in the premises. *United States v. Tingey*, 5 Pet. 127. That a bond made payable to the United States, even if taken without authority of a statute, is binding at common law, see *Tyler v. Hand*, 7 Howard, 573; *Jessup v. United States*, 106 U. S. 147; *United States v. Bradley*, 10 Pet. 343; *United States v. Hodson*, 10 Wallace, 395. The bond was voluntarily entered into, and is itself *prima facie* evidence of that fact. *United States v. Mora*, 97 U. S. 413.

*Mr. J. J. Johnson* and *Mr. D. W. Baker* for the appellees:

1. A bond made to the United States for a matter in which the United States has no interest is void. *United States v. Draper*, 19 D. C. 85. There is no doubt that it is incumbent upon the party suing on the bond to show that

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he has an interest in it before he can recover in a regular trial prosecuted to verdict. *Ing v. State*, 8 Md. 295. Again it has been held that no officer of the Government of the United States has any authority to take a bond not authorized by law, and that in no case can the bond be treated as a mere voluntary bond. *Jackson v. Simonton*, 4 Cr. C. C. 255.

2. The bond sued on in this case can not be treated as a voluntary bond on the part of the defendants, as the declaration fails to show damage on the part of the United States. *Com. v. Bassford*, 1 E. D. Smith, 233; *Breen v. Kelly*, 47 N. W. Rep. 1067.

If the fact that the execution of the bond was voluntary, would make it valid, there might be an estoppel. But there could be none as to the capacity of the United States to take the bond, as that is matter of law, and none of the authorities hold that the United States have authority to take a common law bond other than for the faithful performance of the duties of their officers and servants. Story on Constitution, Vol. 2, p. 1330, and cases cited; *United States v. Draper*, 19 D. C. 85.

No action can be brought on a bond of indemnity, unless the plaintiff has been damnified, and this must be shown in the declaration. *Coe v. Rankin*, 5 McLean, 354. The damage must have been suffered or paid by compulsion, by some proceedings *in invitum* against the party indemnified. *Crippin v. Thompson*, 6 Barb. 532.

3. The contracts set out in the declaration were not validly executed under Section 2103, R. S., and are therefore null and void and no action lies on the bond to recover money due on them. The sureties have a right to take advantage of the nullity of said contracts, and are not liable on the bond sued upon. *State v. Pollard*, 7 So. Rep. 765.

Mr. Justice SHEPARD delivered the opinion of the Court :

1. The bond that is the subject of the controversy was not required or expressly authorized to be taken by any

statute of the United States, and its validity must therefore depend upon some other support. At the same time, it can not be said to have been extorted in violation of law or as a condition to permission to exercise a plain legal right under existing laws. Therefore, it cannot be declared void on that ground; for it must now be regarded as settled beyond all question that the binding force of an obligation voluntarily executed to the United States, does not necessarily depend upon the existence of previous statutory authority therefor. They may, as a body politic, within the sphere of the constitutional powers conferred upon them and through the instrumentality of the proper department to which these powers are confided, enter into contracts not prohibited by law, when appropriate to the just exercise of those powers. *United States v. Tingey*, 5 Pet. 115, 127; *United States v. Bradley*, 10 Pet. 343, 350; *United States v. Linn*, 15 Pet. 290; *Tyler v. Hand*, 7 How. 573; *United States v. Hodson*, 10 Wall. 395, 406; *United States v. Mora*, 97 U. S. 413, 421; *Jessup v. United States*, 106 U. S. 147, 151; *Howgate v. United States*, 3 App. D. C. 277, 295.

The beneficiaries of the bond, in so far as the special contracts are concerned, were not citizens of the United States or of a State, but members of a tribe of Sioux Indians living upon a reservation that had been assigned by Act of Congress (25 Stat. 888), for their occupation and use under the general supervision and control of the Government. It is, therefore, claimed on behalf of the United States that the bond was voluntarily given by the makers and received by the proper officers of the Government, in the course of this general power of supervision and control, both for the indemnification of the Government and for the security of the Indians, with whom it had permitted the contracts to be made; and is, in consequence, a valid common law obligation and enforceable as such. Under the allegations of the declaration, admitted by the demurrer, the bond was voluntarily given by the makers in furtherance of their own in-

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terests. The executed bond itself is a *prima facie* evidence that it was voluntarily entered into. *United States v. Mora*, 97 U. S. 413, 421. It was not within the prohibition of any statute or contrary to public policy, and appears to have been accepted for the commendable purpose of securing wages for these untutored people and their payment when earned. It may be conceded, however, that if the United States had no special power of supervision and control over the privileges and interests of these Indians, as such, the bond would be invalid; for the United States cannot assume guardianship of an individual and make contracts concerning his private affairs that they may enforce, or that he, even, might enforce for his own benefit, as can be done, in some instances, by a third person, in the case of a contract made between others for his express benefit, or to which he may, in some proper manner, be privy. It follows, then, that the right of the United States to recover, by virtue of this bond, either to the extent of their own damage incurred in the return of the Indians to their reservation, or for the benefit of the Indians themselves, to the extent of the special damages sustained by them through the breach of their contracts as named in the bond, must depend upon the nature of the relations of said Indians to the Government, its powers of control over, and its duties and obligations to them.

2. Beginning early in the history of the Republic, it was the custom to make solemn treaties with the Indian tribes until the practice was declared at an end by act of Congress, March 3, 1871 (R. S., Sec. 2079.) But notwithstanding such a treaty had been made with the Cherokee tribe or nation, as it was called, that nation was declared not to be entitled to bring a suit against a State of the Union in the Supreme Court of the United States, as a foreign State within the provision of Section 2 of Article 3 of the Constitution. *Cherokee Nation v. Georgia*, 5 Pet. 1. In that case, Chief Justice Marshall said: "They may more correctly perhaps be

denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian. They look to the Government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father." *Id.* p. 17.

In the *United States v. Forty-three Gallons of Whiskey*, 93 U. S. 188, 194, it was also said: "The only efficient way of dealing with the Indian tribes was to place them under the protection of the General Government. Their peculiar habits and character required this; and the history of the country shows the necessity of keeping them separate, subordinate and dependent." Again, it was said in *United States v. Kagama*, 118 U. S. 375, 383: "These Indian tribes are the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." See also *Cherokee Nation v. Kansas R. Co.*, 135 U. S. 641, 655.

This guardianship extends to the individual members of the tribe as long as they are to be regarded as such, and the continuation of the recognition of tribal existence is a matter for the determination of the political department, in which it will be respected and followed by the courts. *United*

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*States v. Holliday*, 3 Wall. 407, 419. In that case it was held that a citizen could be punished under the provisions of an act of Congress forbidding the sale of liquor to "any Indian under the charge of an Indian agent or superintendent," although the sale had been made to an Indian in the State of Michigan, who occupied and owned land, and who had, under the authority of the law of that State, voted in county and town elections; it being made to appear that he was still connected with his tribe, and continued to receive his annuity under the treaty therewith.

3. The foregoing view of the relations of the Indians with the United States has been acted upon by the political department of the Government for many years without change, except to make those relations closer and more binding. A Commissioner of Indian Affairs has been provided, who has the general management of all affairs and relations with the Indians. The limited nationality of the tribes is no longer recognized save in respect of former treaties. No more treaties are permitted to be made, and since March 3, 1871, they have been subjected to the disposition of Congress. R. S., Sec. 2079. Tribes and remnants of tribes have been assigned to reservations of public lands where they are subjected to the control of resident superintendents and agents appointed by the President. Severe penalties are provided for persons occupying or grazing their lands. Persons found within those reservations contrary to law may be forcibly removed by the agents, and all persons whose presence may, in the judgment of the agents, be detrimental to peace and good order are subject to summary expulsion. Their surplus live stock may be sold for their benefit by the agents. Id., Sec. 2127. Trading with them must be under license with bond to secure lawful conduct, and the privilege is subject to arbitrary revocation. The President has the power at any time to prohibit the introduction of any particular article into the country of a tribe, and, as we have seen in some of the cases above cited, severe penalties have

been provided against the introduction of intoxicating liquors into the Indian country, and their sale to any Indian connected with a tribe or reservation. They are expected to remain upon their reservations, subject to the supervision of the agents, and these are prohibited by express enactment from giving permission, in writing or otherwise, to an Indian to enter at least one State of the Union, upon any pretext whatever. 21 Stat. 132. They receive frequent distributions of money, food and supplies. Large sums are annually appropriated by Congress for their use and benefit in these and other respects. Schools are provided for the education of their children, and opportunities for religious instruction are afforded. Instructors are provided to train them in husbandry and in some of the mechanical arts. When prepared for and desiring to adopt the habits of civilized life, provision is made for the allotment of lands in severalty; and in all cases of allotment, the title is to be retained by the United States in trust for the period of twenty-five years, and the agents of the Government are required to protect each person in his possession. At the end of the twenty-five years the absolute title becomes vested in the occupant.

When an Indian shall have availed himself of the foregoing privilege, he is declared entitled to all the immunities and privileges of citizens of the United States, as well as to the equal protection of the laws. 24 Stat. 388.

4. Without undertaking to mention all the particular subjects of legislation concerning the Indians, or to enumerate all the decisions of the courts in which their relations to the United States have been discussed and determined, we think that enough has been recited to show that they are, in a general sense, "wards of the nation," and entitled to the care and protection of the Government, collectively and individually, until such time as they may become absorbed in the population and citizenship of the several

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States, and cease to be recognized and treated by Congress as remaining separate and apart, under their old tribal or community associations, as Indians only. Occupying this relation, the Indians, for whose protection, in part, this bond was delivered and received, were permitted and encouraged to leave the reservation temporarily, in the performance of their contracts. The payments promised them were not made, and they were left penniless and helpless in a distant State. The Government owed them the duty to return them to their reservation, and in its performance expended money that had been appropriated for disbursement for the benefit of the Indians, under the direction of the Department of the Interior. One of the conditions of the bond was made in order to indemnify the Government against this contingent liability. The United States could have refused permission to the Indians to accompany Taylor. Having given it, they incurred obligation for the cost of their return in case Taylor should fail to perform his contracts. Taylor gave the bond in order to obtain this permission, as well as to secure the payments promised to the Indians. Having done so, why should not his sureties be compelled to answer for the breach? *United States v. Mora*, 97 U. S. 413, 421. In that case, in order to procure the clearance of a vessel from the port of New York to the Mexican port of Matamoras (A. D. 1863), the owner was compelled to give a bond to the United States in double the value of the cargo, conditioned that the vessel should proceed to the port of destination, land its cargo for consumption in Mexico, and specially, that the same should not be transported to any place "under insurrectionary control," and so forth. Suit was brought upon the bond for breach of the aforesaid conditions. The bond was not required by the statute. The collector was authorized to take certain other bonds, and also to refuse clearance altogether. Instead of refusing the clearance, he granted the same in consideration of the execution of the bond. It was held that the United States could recover of

the surety thereon. In delivering the opinion of the court, Mr. Justice Bradley said :

“Now, under certain circumstances, specified in the second section of the act, the collector had authority to take a certain bond, without being instructed thereto by the Secretary of the Treasury. By virtue of instructions given by the Secretary, under the third section, the collector had authority, and was required to take a certain other bond, and he was further authorized to refuse a clearance altogether. Under this last power of refusing a clearance, what was there to prevent him, or to make it unlawful for him, to take such a bond as was given in this case, if the owner of the goods chose to enter into it for the purpose of inducing the collector to grant the clearance? It only requires what the law sought to secure. If the shipper chose to give the bond in order to get his goods cleared, it was a voluntary act on his part; and what ground has he or his sureties to complain? The only complaint they could make, if they could make any, was, that the circumstances did not exist which would have justified the collector in refusing a clearance, and that the taking of the bond was therefore an act of duress. But this the defendant did not attempt to prove. He put himself at the trial on the sheer ground that the collector had no right to take such a bond at all as the one in question. But the right to take the bond, so far as the shipper and his sureties are concerned, was included in the greater right to refuse the clearance altogether.”

It is to be observed, also, that the bond in the foregoing case was strictly penal, the Government sustaining no pecuniary loss or damage that could be estimated; but in the case at bar the bond is one of indemnity against such actual loss, and the damage is limited and ascertainable with certainty.

We think, then, that to the extent of the money actually expended by the United States for the return of the Indians, they are entitled to recover in this action. Even if the re-

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maintaining conditions of the bond should be held unwarranted by law or illegal, they would not prevent recovery for the breach of this one, as they are separable therefrom. *United States v. Hodson*, 10 Wall. 395, 408; *United States v. Mora*, 97 U. S. 413, 422.

5. Coming now to the particular consideration of the conditions of the bond looking to the performance of Taylor's contracts with the Indians separately, we think it equally clear that they cannot be declared invalid upon the ground that there was no express authority of law therefor. In view of the dependent relations of the Indians as hereinbefore stated, we think the bond comes within the rule enounced in *Tyler v. Hand*, 7 How. 573, 583.

In that case, it appears that Martin Van Buren, as President of the United States, had sold to the defendants certain sections of public land that had been set apart in a treaty made in 1830 with the Choctaw Indians for the benefit of the orphan children of that tribe. The sales were made upon credit and bonds for the purchase money were made payable to Martin Van Buren, President of the United States, and his successors, for the use of the orphan children provided for in the treaty. Suit was brought upon the bonds by a succeeding President, John Tyler, for the use, and so forth, as aforesaid, without designating the particular beneficiaries by name. A demurrer was sustained to the declaration, the grounds of which, among others, were, that plaintiff showed no title to the bonds, nor such an interest in the suit as authorized him to maintain it; and that they were without consideration or the authority of law. This judgment was reversed, and the cause remanded, with direction to overrule the demurrer and enter judgment for the plaintiff for the amount of principal and interest due on the bonds. Discussing the bonds, the court said: "They are valid instruments though voluntarily given and not prescribed by law. *United States v. Tingey*, 5 Pet. 115. It is not the case of a bond given contrary to law, or in violation of law, but

that of bonds given voluntarily for a consideration expressed in them, to a public officer, but not happening to be prescribed by law."

In order to maintain the action it is not essential that the United States should have a beneficial interest in the performance of these conditions. The seal of the instrument imports a consideration, and action thereon cannot be maintained at law except in the name of the obligees. *Anderson v. Longdon*, 1 Wheat. 85; *Hoxie v. Weston*, 19 Me. 322, 329; *Baker v. Haley*, 5 Greenleaf, 240; *Sanders v. Tilley*, 12 Pick. 554; *Northampton v. Elwell*, 4 Gray, 81; *Tyler v. Hand*, 7 How. 583.

The judgment that may be rendered herein will effectually bar any other action that might be brought upon the bond in any right or interest whatsoever. The trust on behalf of the Indians is apparent on the face of the bond, and it is not perceived how the defendant is concerned in the final adjustment of the equities of the subject matter between the United States and the several Indian beneficiaries.

For the reasons given, the judgment will be reversed, with costs to the appellants, and the cause remanded for further proceedings not inconsistent with this opinion. It is so ordered. *Reversed and remanded.*

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Syllabus.

## THE METROPOLITAN RAILROAD COMPANY

v.

CHURCH.

## JUSTICES OF THE PEACE.

An order of the court below quashing a writ of *certiorari* to a justice of the peace to prevent the empaneling of a jury in a cause pending before him, *affirmed*; following *Hof v. Capital Traction Company*, 10 App. D. C. 205.

No. 674. Submitted April 28, 1897. Decided April 29, 1897.

HEARING on an appeal from an order quashing a writ of *certiorari* issued to a justice of the peace. *Affirmed*.

*Mr. Nathaniel Wilson* and *Mr. D. W. Baker* for the appellant.

*Mr. E. L. Schmidt* and *Mr. Walter C. Clephane* for the appellee.

Mr. Justice MORRIS delivered the opinion of the Court:

This is an appeal from an order of the Supreme Court of the District of Columbia, quashing a writ of *certiorari* that had been issued by that court to a justice of the peace to prevent the empaneling of a jury in a cause pending before him.

The facts and circumstances of the case do not differ substantially from those of the case of *Hof v. The Capital Traction Company*, 10 App. D. C. 205. The question, perhaps, is here more distinctly and specifically raised of the unconstitutionality of the act of Congress of March 1, 1823 (3 Stat. 743), so far as it authorizes justices of the peace to summon juries in causes pending before them, as well as the unconstitutionality in the same regard of all the subsequent legislation of Congress enlarging the jurisdiction of

justices of the peace. But there is otherwise no difference. We sustained in the case of *Hof v. The Capital Traction Company* the constitutionality of the enactments in question; and we adhere to that decision. Upon the authority of it, we affirm, with costs, the order of the Supreme Court of the District of Columbia in the present case, which seems to have been rendered in pursuance of our former decision. And it is so ordered.

For the reasons assigned by him in his dissenting opinion filed in the case of *Hof v. The Capital Traction Company*, the CHIEF JUSTICE concurs in the conclusion reached by the majority of the court, while still dissenting from the reasoning by which that conclusion has been reached.

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### SEYMOUR v. NELSON.

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#### PRACTICE; MANDAMUS; ABATEMENT.

1. A petition for a writ of *mandamus* to a public officer of the United States abates by reason of his retirement from office as well after judgment and pending an appeal as before.
2. And in such event the practice is not to dismiss the appeal but to reverse the judgment and remand the cause to the lower court with directions to dismiss the suit for want of proper parties.

No. 663. Submitted April 12, 1897. Decided April 30, 1897.

HEARING on a motion to dismiss an appeal from a judgment awarding a writ of *mandamus*. *Motion denied, but judgment reversed.*

*Mr. Chester Bradford* and *Mr. E. W. Bradford*, for the appellee, for the motion.

*Mr. W. A. Megrath*, for the appellant, opposed.

Mr. Justice SHEPARD delivered the opinion of the Court:

This is an appeal taken by John S. Seymour from a judgment of the Supreme Court of the District of Columbia

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awarding a writ of *mandamus* to compel the performance of an official act by him as Commissioner of Patents. Pending this appeal, his term of office has expired, and he has been succeeded by the Hon. Benjamin Butterworth.

The appellee, A. B. Nelson, brings these facts to the notice of the court and moves that the appeal be dismissed at the appellant's cost. The doctrine of the Supreme Court of the United States established by a uniform series of decisions is that a petition for a writ of *mandamus* to a public officer of the United States abates by reason of his retirement from office as well after judgment and pending an appeal therefrom as before. *Warner Valley Stock Co. v. Hoke Smith, Secy., &c.*, 165 U. S. 28. And the uniform rule of that court has been not to dismiss the appeal in such cases, but to reverse the judgment and remand the cause to the court in which it originated, with direction to dismiss the suit for the want of proper parties. The result is the same, whether the judgment (or the decree, in event the proceeding be by injunction instead of *mandamus*) that has been appealed from was in favor of or against the officer. *Warner Valley Stock Co. v. Smith, supra*; *Hoke Smith, Secy., &c., v. Reynolds*, present term Supreme Court U. S.

In obedience to the rule established by the foregoing cases, we cannot grant the motion to dismiss the appeal, but are compelled to reverse the judgment and remand the cause, with direction to dismiss the petition, with costs, for the want of proper parties. It is so ordered.

*Reversed and remanded.*

## DEXTER v. GORDON.

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EQUITY PLEADING; EVIDENCE; EQUITABLE ASSIGNMENT; OFFER AND ACCEPTANCE.

1. Allegations of an answer to a bill in equity which are not directly responsive to the charges in the bill, but raise an independent defence in the nature of confession and avoidance, and which are put in issue by the replication, are not themselves evidence but must be proved.
2. Where such an allegation in an answer so put in issue by the replication sets up an estoppel in bar by reason of a decree which is made an exhibit to the answer, but the decree is not proved or offered in evidence, such decree can not properly be considered in evidence.
3. An offer or promise by the purchaser of real estate to assign to the vendor so much of a claim belonging to him as would amount to double the balance of the purchase money due when accepted by her, which offer he alleges she accepted, will constitute an equitable assignment of that portion of the claim, without regard to the form of the words or whether the promise to assign was in writing, as equity will regard that as done which ought to be done, and will give effect to it.
4. And where such a purchaser defeats a suit by the vendor for the balance of the purchase money, on the ground of her acceptance of his offer to assign a portion of the claim held by him, he is estopped to assert there was no assignment of his interest in the claim when she subsequently accepts such offer in a suit to establish her rights to a fund realized from the payment of the claim.

No. 662. Submitted April 15, 1897. Decided May 10, 1897.

HEARING on an appeal by the defendant from a decree in a suit to establish complainant's right to a fund in the hands of the Secretary of State, and to enjoin the defendant from receiving the same. *Modified and affirmed.*

The facts are sufficiently stated in the opinion.

*Messrs. Cook & Sutherland, Mr. Alphonso Hart, and Messrs. Phillips & McKenney* for the appellant.

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*Messrs. Barrett & Niles* for the appellee.

Mr. Justice SHEPARD delivered the opinion of the Court :

This is an appeal from a decree of the Supreme Court of the District of Columbia establishing complainant's right to a fund of \$1,600, less certain credits, in the hands of the Secretary of State of the United States, and enjoining the defendant, James E. Dexter, from receiving the same. The complainant, Fanny K. Gordon, sues as assignee of Anne W. Frazer, upon a claim arising on a sale of certain lands by said Anne W. Frazer to the defendant, Dexter.

It appears that in February, 1893, said Frazer sold certain improved lots and lands in and near Staunton, Virginia, to said Dexter, subject to certain incumbrances. She was very needy and compelled to sell. The price to be paid by him was \$1,200, part of which he paid in cash at the time or immediately after, leaving a balance due that is the subject of controversy. Mrs. Frazer claimed the balance of this sum in cash, and Dexter claimed that she had accepted an offer by him, at the time, of an interest in what is called the "Mora Claim," at the rate of two dollars of said claim for each dollar of the said balance. It appears that Mrs. Frazer did not recognize the claim of Dexter to such an arrangement, and being dissatisfied, began a suit against him to rescind.

It is conceded that this was ill advised and it was soon discontinued. Then she sued him at law, claiming the balance due in money. This suit appears also to have been discontinued.

The "Mora Claim" was a demand for damages urged by said Mora against Spain for about \$1,500,000, and was at the time of this transaction, and had been for years, the subject of negotiation on behalf of Mora by the United States through the Department of State. Being still unsettled and the subject of some doubt, the value of the claim was entirely speculative, and the evidence tends to show that the highest rate

at which an interest in it had been traded or sold was about fifteen cents on the dollar. Dexter owned and controlled certain shares of the claim at the time, in amount more than sufficient to have satisfied the balance due Mrs. Frazer at the value of his offer; and at and before the time of the institution of this suit evidences of his claim seem to have been on file in the office of the Secretary of State. In the summer and fall of 1895 arrangements were completed with Spain by which the payment of the "Mora Claim" to the Secretary of State was assured. The evidence fails to show the exact date of the settlement or the payment of the money.

Mrs. Frazer, having had no final settlement with Dexter, either in the "Mora Claim" orders or in money, filed a bill against him and the Secretary of State. Pending that suit, which was subsequently dismissed, she assigned her claim to the appellee, Fanny K. Gordon. In the meantime Mrs. Frazer had filed her demand against the fund with the Secretary of State, accompanied by an account made out by Dexter, and had received from the Secretary the sum of \$50 on account, to relieve her pressing necessities.

The history of the litigation as above given is gathered from the evidence of witnesses on both sides, who testified concerning it without objection. Defendant, by his answer, set up this litigation, and its results in bar of complainant's demand, attaching to said answer copies of the various proceedings. These allegations of the answer were not in direct response to the charges of the bill, but raised an independent defense in the nature of confession and avoidance. Having been put in issue by the replication it was incumbent upon the defendant to make proof of them. *McCoy v. Rhodes*, 11 How. 131, 141; *Clements v. Moore*, 6 Wall, 299, 315; *Roach v. Summers*, 20 Wall. 165; *Humes v. Scruggs*, 94 U. S. 22, 24; *Seitz v. Mitchell*, 94 U. S. 580, 582. Inasmuch as the pleadings in said several suits could not themselves work an estoppel, their exclusion from the case is a matter of no practical importance. But the question is different in

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respect of the decree alleged to have been passed dismissing the bill filed by Mrs. Frazer against the defendant and the Secretary of State, which decree is claimed to be a complete and final adjudication of the issues involved in this case, and, as such, binding on the appellee as assignee of said Frazer. It is clear that the appellee did not attempt to make herself a party to that suit, and there is some evidence tending to show that notice of the assignment was given to the counsel for Dexter before the final hearing of the cause, and that it was mentioned to the court before any decree was passed. The copy of that decree, which is attached to the defendant's answer, recites that the cause came on for hearing on the bill, the demurrer of the Secretary of State, and the answer of the defendant, and the proofs and exhibits; and that the demurrer was sustained, the injunction denied, the restraining order dissolved, and the bill dismissed. It is conceded that no evidence had been taken in the case.

An objection to the estoppel claimed to have been worked by that decree, if it is to be considered as before us, is urged on the ground that, having been rendered after the assignment of the demand by Mrs. Frazer and with knowledge thereof by the counsel for defendant and by the court, it is a nullity in so far as the appellee is concerned. This objection is founded on a distinction claimed between the effect of the voluntary alienation of the subject-matter of the controversy, in equity, by the complainant, on one hand, and by the defendant, on the other, *pendente lite*.

Another question that presents itself is this: whether, if the bill and answer in that case were before us in the evidence, the issues involved and determined are necessarily identical, in substance, with the issues as presented in this. From the parties and from the recitals of the alleged decree, the schemes of the two bills, at least, are at variance. But these questions do not properly arise on the record and need not be determined.

On the argument, the appellee objected to the considera-

tion of the decree because it is not properly in evidence. Although made an exhibit to the answer, the record shows that it was never proved or offered in evidence. Nor has it been made a part of the proof by stipulation. As we have seen above, the independent allegations of the answer setting up the estoppel in bar, having been put in issue by the replication, were not themselves evidence. Like the unadmitted allegations of the bill, they amount to nothing if not proved. One of the cases cited above is directly in point. *Humes v. Scruggs*, 94 U. S. 22, 24. In that case the appellee, Scruggs, who was the defendant, sought to bar recovery by setting up a decree rendered in another cause concerning the property in controversy, a copy of which was annexed to the answer. There was a general replication as in this case. Referring to the decree, the court said: "It is supposed that this suit, and this decree, forming a part of the answer of Mrs. Scruggs, furnished the support to the decree dismissing the bill in the present suit on the pleadings. . . . By the interposition of a general replication, every allegation in the answer of Mrs. Scruggs, not responsive to the bill, was denied. No such allegation could be taken as true, but must be proved before it could be used by the party making it. The allegation of a former suit and of the decree therein came under this rule."

We pass now to the consideration of the evidence concerning the transactions between Anne W. Frazer and the defendant Dexter in regard to the payments made and promised to be made for the lands conveyed by her to him. Both agree that the amount of the consideration was fixed at \$1,200, but differ materially in respect of the amounts actually paid and of the manner of payment agreed upon for the residue. Defendant has maintained from the beginning that the offer was made by him and accepted by Mrs. Frazer to pay the balance of the purchase money in an interest in the "Mora Claim." When Mrs. Frazer sued him at law to recover the balance due as claimed by her, his affidavit of defense,

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made a part of the present bill, so stated the contract. He rendered her an account, the date of which does not appear, though the last item of debit is of April 3, 1893, which she filed with the Secretary of State. It shows a balance due her of \$826.10, and thereunder is written: "This balance to be paid by an assignment in the Mora Claim of double the amount." In his answer in this suit he says that he agreed to pay the balance in the "Mora Claim," and "that he would make these cash payments to and for her, and after they were made they would look over the amount of money and bills paid by him to and for her and ascertain the balance due, and when it was so ascertained, and not before, he would transfer and assign to her an interest in the Mora Claim in double the amount of the balance found due." Elsewhere in the same answer he affirms his promise to assign her a part of the "Mora Claim" in amount double the balance due. In his testimony also he says that he offered to assign her the interest in the "Mora Claim" for the balance; that she took time to make inquiries as to its value and chances of recovery, and then returned and accepted the offer. The consideration on her part was complete and more than adequate, considering the value of the claim at that time. She had executed and delivered to him a formal conveyance of her property. Looking at the contract or agreement from defendant's point of view, there seems to be a clear case of an equitable assignment to Mrs. Frazer of so much of the "Mora Claim" belonging to him as would amount to double the balance due her, whatever that was. His was not a mere promise to pay her out of the fund whenever he might collect the same; but an offer, a promise, to assign her a present interest in the claim itself. Without regard to the form of words, this was his plain intention, and equity will regard that as done which ought to be done, and give effect to it. *Christmas v. Russel*, 14 Wall. 69, 84; *Wood v. Dickinson*, 18 D. C. 301, 306; *Williams v. Ingersoll*, 89 N. Y. 508, 521; *Fourth Street Bank v. Yardley*,

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165 U. S. 634, 644. That this promise to assign was not in writing does not affect the right. It is not necessary to its operation that it be so expressed. *Bank v. Yardley*, *supra*; *Williams v. Ingersoll*, 89 N. Y. 508; *Crane v. Gough*, 4 Md. 316, 334; *Field v. Megaw*, L. R. 4 C. P. 660.

The fact that Mrs. Frazer did not at that time so regard the agreement between them ought not, under the circumstances, to affect her right to recover according to *his* version of it. What right has he to complain if the contract shall be enforced as he declares it to have been made? He has suffered no injury. There is no element of estoppel. It is true that she sued him at law for the recovery of the unpaid balance of the purchase money; but he met her demand with the assertion of a promise of the assignment as a full discharge of the obligation, and she took nothing by her suit.

When she sued in equity to assert some interest in the "Mora Claim," he met her again with determined and effective opposition to the remedy sought. During all this time he paid her no money, and has made no offer of satisfaction, in any form, of the small balance that even he admits to be due. When she sued at law, he tendered her no assignment of the "Mora Claim" for any amount. When she sued in equity he tendered her no money. Having refused to settle according to her understanding of the contract, he has so far failed to tender even part performance according to his own. He had her title and the enjoyment of her property. He seems in fact to have negotiated a loan by its mortgage. She was without written evidence of the transaction, and had nothing but the small sums that he had paid her and which went at once to prevent the sacrifice of some of her remaining household and personal effects. Having had full performance by her, he could afford to wait. She, on the other hand, was driven to action by his delay.

In the light of the criticism that her conduct in the premises has received, and whatever view may be taken of it,

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it must be remembered that she was a woman of apparently no business capacity; that she was in a desperate financial strait, and that she seems to have had implicit confidence in defendant's integrity and generosity. Let it be conceded that she has not been free from blame in the course that she has pursued, and yet, nevertheless, his conduct remains without justification or excuse.

It is further contended on behalf of the appellant that his offer or promise to assign to Mrs. Frazer the part interest in the "Mora Claim" ceased to bind him because of her non-acceptance or, rather, repudiation of it. No one pretends to doubt the abstract proposition that an unaccepted offer can not form the foundation of an action; but it has no application in this case. Having accepted and retained the title and possession of her property, he can not invoke a principle of law applicable in the case of a proposed seller or contractor whose offer has been declined. He made no offer to rescind by reason of her misunderstanding or repudiation of the contract, whichever it may have been. He held the property in accordance with, and subject to, the contract as he understood and asserted it to be. She, failing in her contention, and appreciating at last the advisability of accepting his version of the contract, proceeded to do so. His offer, remaining as it had been made, was at last accepted and acted upon. The suit by the appellee, as assignee of Mrs. Frazer, is for performance simply of the contract which he claims to have entered into. It does not lie in his mouth now to object or complain. Equity and good conscience alike forbid.

It now remains to consider the conclusions in respect of the amount of the "Mora Claim" fund to which appellee is entitled. In this respect the decree, as entered, is somewhat uncertain in its terms and should be amended. Without discussing the evidence, we think it shows that the statement of the account by Mrs. Frazer is substantially correct, showing that up to April 7, 1893, she had received from Dexter,

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in various amounts, the sum of \$554.90, leaving a balance due her of \$645.10. Doubling this sum, according to the contract, she was then entitled to receive from the "Mora Claim" the sum of \$1,290.20. From this must be deducted, of course, the \$50 received by Mrs. Frazer from the Secretary of State. We think, also, that appellant is entitled to a credit for the sum of \$21.89 for back taxes paid by him on the lands purchased from Mrs. Frazer. We must presume that she was bound for the taxes under her deed, and the testimony by appellant to their payment is unquestioned. The true balance of the fund, then, to which the appellee is entitled, amounts to the sum of \$1,218.31, and the decree should have been for that sum. As so modified, the decree will be affirmed, with costs to the appellee, and the cause remanded with direction to amend the decree in accordance with the decision of this court. And it is so ordered.

*Modified and affirmed.*

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DISTRICT OF COLUMBIA v. HUMPHRIES.

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APPELLATE PRACTICE; DISMISSAL OF APPEAL; TRIAL PRACTICE;  
VERDICT, RENDITION OF; RULES OF COURT.

1. Where the lower court extends its term thirty days from the entry of an appeal within which to settle bills of exception, but fails to settle them until more than two months elapse, at which time thirty days additional are given the appellant to file the transcript of the record in this court, the appeal will be dismissed here for violation of Rule XIV, which provides that the transcript must be filed in this court within forty days from the time of the appeal entered and perfected in the court below.
2. The verdict of a jury, whether oral or sealed, can not be received

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from eleven of the jurors, one of the number being absent, the right to poll the entire jury being an absolute right in either party.

3. A sealed verdict so rendered is a mere nullity and of no effect, but *quære*, whether a judgment rendered upon such a verdict is void or only voidable.
4. Where a transcript of the record on an appeal from such a judgment is filed in this court after the forty days prescribed by the rule, on a motion to dismiss the appeal the judgment will not be declared to be an absolute nullity, but the appeal will be dismissed, and the appellant left to his remedy, if he has one, by motion under Section 6, of the Maryland Act, 1789, Chapter 9, providing for setting aside judgments founded in irregularity in obtaining the same.
5. A rule of this court is the law of the court, as it is of the parties, and there is no dispensing power in the court to meet what is supposed to be the pressing exigency of a particular case.

No. 671. Submitted April 23, 1897. Decided May 10, 1897.

HEARING ON a motion by the appellee to dismiss the appeal upon the ground that the transcript of record was not filed within the time prescribed by Rule XIV of this court. *Granted.*

The facts are sufficiently stated in the opinion.

*Mr. Arthur A. Birney* for the motion.

*Mr. Sidney T. Thomas*, Attorney for the District of Columbia, and *Mr. Andrew B. Duvall*, Assistant Attorney, opposed.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

The motion is to dismiss the appeal. In the first instance, the motion was made by the appellee, Elizabeth M. Humphries, the plaintiff below, to docket and dismiss the appeal under Rule XIV of this court, upon the ground that no transcript of the record had been filed here within the forty days prescribed by that rule. But this court being advised that the subject of the exception taken by the appellant, the District of Columbia, was still under consideration by the court below, and not then settled, action of

this court was deferred upon that motion. And before action had upon that motion, a transcript of the record was filed by the appellant, whereupon a motion to dismiss the appeal was made upon the ground that the transcript had not been filed by the appellant *within forty days from the time of the appeal entered and perfected* in the court below. According to the transcript filed, the only entry of an appeal appears of date the 4th of January, 1897, and of the same date there appears the entry of the extension of the term of court for *thirty days* within which to settle bills of exceptions, under the rule of the court below. The bills of exception were not signed within the thirty days, but were signed, *nunc pro tunc*, the 8th day of March, 1897, and *from that time*, by the order of the court, thirty days were given within which to file the transcript of the record in this court. This, however, was not in accordance with the rule of this court; and the transcript was not produced and filed in this court until March 27, 1897—nearly three months from the time of the appeal entered.

It appears that there was some dispute or misunderstanding between the counsel of the parties in respect to the matter of settling the bills of exception, and affidavits were filed. But that does not sufficiently account for the delay, or take the case out of the operation of the rule of this court. There was ample time, as well as ample means, for settling the bills of exception within the time prescribed.

The case as now before us presents the question, whether the verdict and judgment as entered in the court below have validity, such as to entitle them to be enforced, if unreversed by this court; or whether they are not mere nullities, without any force or effect whatever.

The case was tried by a jury; and the record contains this entry in respect to their verdict, and the circumstances under which it was received by the court:

“Come here again the parties aforesaid, in manner aforesaid, and the same jury return into court, except John T.

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Wright, who does not appear, and, having said sealed verdict in his possession as foreman, sends the same to the court by Dr. McWilliams, who delivers the same to the court with the statement that the said John T. Wright is ill and confined to his bed and physically unable to appear in court; that he, said McWilliams, is his attending physician, and as such received from said Wright said sealed verdict with directions to deliver it to the court. Whereupon the defendant, by its counsel, objected to the reception, opening, and reading of said sealed verdict; whereupon, in answer to the questions of the court, the remaining jurors severally on their oath say, that they severally signed said verdict, and that they saw said John T. Wright sign the same, and that the name 'John T. Wright,' signed thereto, is in his handwriting; 'thereupon the remaining jurors on their oath say they find said issue in favor of the plaintiff and assess her damages by reason of the premises at seven thousand dollars (\$7,000).'

"The counsel for the defendant ask that the jury be polled, which is done, and each of said remaining jurors on his oath says that he finds said issue in favor of the plaintiff, and assesses her damages by reason of the premises at \$7,000."

This proceeding seems to have occurred on the first day of December, 1896, and on the 4th day of that month, the defendant moved in arrest of judgment; and one of the grounds assigned for the motion was, that there was no verdict returned by the jury upon which judgment could be rendered.

This motion was overruled, and thereupon the court proceeded to render judgment upon the verdict, and adjudged that the plaintiff recover against the defendant \$7,000 damages, in manner and form aforesaid assessed, etc. From this judgment an appeal was noted, and it is the only entry of an appeal that appears in the record.

Subsequently, that is to say, on the 22d of January, 1897,

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the plaintiff moved the court "to correct the entry upon its record of the verdict rendered, by setting out therein at length the written verdict returned under seal, because she says the said verdict or any recital of its contents do not now appear in said entry or any other entry." Upon this motion, the court ordered that the original entry of the verdict be corrected, "now for then, by striking therefrom the following, which was inadvertently entered, to wit: 'Thereupon the remaining jurors on their oath say they will find said issue in favor of the plaintiff and assess her damages by reason of the premises at \$7,000,' and insert in lieu thereof the following, as ordered recorded by the court at the time said verdict was rendered, to wit: 'And thereupon the court receives said sealed verdict as the verdict of the jury and orders the same spread upon the minutes, and the same is in the following words.'" Then follows the sealed verdict that was returned, signed by the twelve jurors. To this order of the court, directing the correction of the verdict, in the particular mentioned, the defendant objected, and noted an exception to the action of the court.

Upon this verdict as corrected under the order of the court, there was no new judgment entered; but the judgment as originally entered, upon the first entry of the verdict as of the eleven jurors, was allowed to stand.

As will be observed, the only change in the original entry of what purported to be the verdict was in placing upon record the paper signed, and sealed up by the twelve jurors, in place of the entry of the oral verdict of the eleven jurors as delivered in court, in which oral verdict, as delivered, it was declared that "the *remaining jurors* on their oath say, they find said issue in favor of the plaintiff and assess her damages by reason of the premises at seven thousand dollars;" and when counsel for the defendant asked that the jury be polled, there were only eleven jurors present to respond to the call. The verdict, therefore, as delivered in court, where only it could be delivered, was the

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verdict of eleven jurors instead of twelve; and such verdict was accepted against the objection of the defendant. The subsequent incorporation of the written and sealed paper, signed by the twelve jurors out of the court the day before the oral verdict was delivered in the court by the eleven jurors, did not cure the defect of the verdict delivered by the eleven only. The fact remains of record, and about which there is no question, that the foreman with whom the sealed verdict had been left, upon the separation of the jury, did not appear in court, and did not, therefore, deliver the verdict in court, and did not, when the jury were ordered to be polled, respond to the inquiry whether the verdict was his. Whether the verdict be reduced to writing and sealed up and brought into court, or delivered orally by the mouth of the foreman, in either case, the jury should be called upon by the clerk of the court to hearken to their verdict as the court hath recorded it, reading it to them, and if they all assent or remain silent, the clerk concludes by saying, "and so you all say." This gives each juror a final and last opportunity to make known or express his dissent from the verdict as delivered. But as a further protection and safeguard to the parties, it is an established practice in the courts of this District, as it is in the courts of the State of Maryland, and of the courts of many of the other States of the Union, and also of England, that either party has the right to have the jury polled, on the rendition of the verdict by the foreman, at any time before it is finally recorded; and this, although the verdict has been a sealed one, and the jury have separated before bringing it in; unless the right to poll has been *expressly waived*. *Bunn v. Hoyt*, 3 Johns. 255; *Root v. Sherwood*, 6 Johns. 68; *Fox v. Smith*, 3 Cow. 23; *Jackson v. Hawks*, 2 Wend. 619; *Labar v. Koplin*, 4 N. Y. 547; *Blackley v. Sheldon*, 7 Johns. 33; *Rigg v. Cook*, 9 Ill. 351; Thompson & Merriam on Juries, Secs. 337, 338. This subject is very fully and ably examined by Judge Folger in the case of *Warner v. The N. Y.*

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*Central R. Co.*, 52 N. Y. 437, where it was held that the verdict can only be received from the jury in court, in the presence of the parties, if they think proper to be present, and that it is the right of either party to have the jury polled, unless that right be expressly waived, and that such right is not waived by simply agreeing that the jury may return a sealed verdict.

The right to poll the jury is regarded as an absolute right in either party, and the refusal of the trial court, upon request to have the jury polled, is such an error as will require the appellate court to reverse the ruling. *James v. State*, 55 Miss. 57. In this last case mentioned it was said by the court: "Parties should have the means to protect themselves against the consequences of undue influence of any sort, which, employed in the privacy of the jury room, may extort unwilling assent to a given result by some of the jury. Less evil is likely to result from upholding the right to have the jury examined by the poll than from denying it. The modern relaxation of the rules as to what irregularities of the jury will vitiate a verdict makes it more important to preserve the only allowable means of ascertaining if the verdict as announced is the unanimous decision of the jury."

In the case of *State v. Young*, 77 N. C. 498, where the question was raised as to the right of a party to have the jury polled, the court said: "The right of the judge to poll the jury is immemorial, and has never been questioned, so far as we are informed. We can see no good reason why it should be denied to the defendant, and we cannot conceive a case in which any harm would result from the exercise of it under the direction of the court, and experience shows that notwithstanding the response of the foreman for the jury, there are cases in which individual jurors refuse to assent on being polled. How is the defendant to know that this is really the verdict of all, and that no one has been deceived or coerced into an assent to that which his

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judgment does not now concur in? There is no mode of ascertaining this fact except by the evidence of the jurors themselves when they come into court. . . . At this time any juror can retract on the ground of conscientious scruples, mistake, fraud, or otherwise, and his dissent would then be effectual. This right is surely one of the best safeguards for the protection of the accused, and as an incident to jury trials would seem to be a constitutional right, and its exercise is the only mode of ascertaining the fact that it is the verdict of the whole jury."

The right to a poll of the jury being established, it follows, as by necessary implication, that the party demanding the polling is entitled to the concurring judgment of each individual juror of the entire panel of twelve, openly expressed in court, in the verdict rendered; and in the absence of such unanimous verdict, there can be no valid verdict at all, and the verdict of eleven only is simply void and without effect. It is no more the verdict of the jury sworn and charged to try and determine the case than would have been the verdict of any less number than the whole panel; say six or seven of the twelve. In this case the jury were instructed to render their verdict in court, and, indeed, it could be rendered nowhere else, without express consent of the parties; and when the jury were polled only eleven of the panel responded, and consequently, in the absence of express consent of the defendant, there could be no verdict rendered.

A case almost exactly in point with the present is the case of *Norvell v. Deval*, 50 Mo. 272. In that case, after a sealed verdict was returned, but before it was opened, one of the jury became insane. The court received the verdict in the presence of the rest of the jury, and denied a request to have them polled. This was held to be error, and that a *venire de novo* should be granted. In that case, the court said, what is entirely applicable to the present case, that "A jury in a court of record must consist of twelve men. If, after a jury is sworn, one of them dies or is rendered incompetent

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by insanity or otherwise, no verdict can be rendered, and a new jury must be ordered. They must all be present in court when the verdict is rendered. This has always been the universal practice, and it would be dangerous to the rights of litigants to adopt any other rule. Either party has the right to poll the jury. It makes no difference whether the verdict is signed by all the jurors or only by the foreman. The parties have the right to know of each juror whether the verdict rendered is his, and this can only be done by polling the jury before they are discharged. The verdict is not perfect till it is delivered to the court by the jury in the presence of all of them. The verdict in this case ought not to have been received from the eleven. The proper course would have been to discharge the jury on account of the insanity of one of them, and let the case be tried by another jury."

The appellee has insisted that there is no absolute right in the parties to have the jury polled, and that a verdict delivered to and received by the court, upder the circumstances of the delivery of the verdict in this case, is not void, but at most only irregular; and several cases have been cited in support of that contention. But the cases cited are quite different from the present. The case most relied on is that of *Koon v. Insurance Co.*, 104 U. S. 106, 107. That case, however, is no authority for what has been done in this. That was not a case of a verdict of eleven jurors only, delivered upon the polling of the panel, when one of the number was absent. But in that case there was a stipulation that the jury might, when they had agreed on their verdict, if the court should not then be in session, sign and seal up the same and deliver it to the officer in charge and disperse; and it was held that such a stipulation was equivalent to an agreement that the court might, when the sealed verdict was handed in by the officer, open it in the absence of the jury and reduce it to proper form; and, further, that the stipulation was a waiver of the right to poll the jury, if they

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*should not be in court.* That case, so far from being an authority to support the contention of the appellee, would seem to fully recognize the right to have the jury polled and to require that the jury should deliver their verdict in court, in the absence of a stipulation waiving those rights.

It being clear that the verdict rendered in this case was a mere nullity and of no effect whatever, the next question is, whether the judgment of the court rendered thereon is also a mere nullity—whether wholly void, or voidable merely? If voidable only, the judgment would be effective until reversed or vacated; and as there may be some doubt as to that question, we shall not declare the effect of the judgment on this motion to dismiss. The motion to dismiss the appeal under Rule XIV of this court, is based upon the assumption that there is an effective judgment in the court below, and the object of the motion to dismiss is to get rid of the appeal, so that the judgment may stand and be enforced as recovered in the trial court. If, however, it were plainly manifest that the judgment appealed from was simply void, and not merely voidable, it would be the duty of this court so to declare, even on a motion to dismiss the appeal under the rule, and thus avoid the necessity of other or further proceedings to have the judgment declared a nullity. Its existence as an effective judgment is the foundation of the motion to dismiss the appeal, and if that foundation does not exist, the motion to dismiss the appeal ought not to prevail. But as there may be a question as to whether the judgment here is an absolute nullity, because of the void verdict upon which it was rendered, and as the transcript of the record was not produced and filed in this court within the time prescribed by the rule, so as to enable this court to review the rulings of the court below as set out in the bills of exception, we must dismiss the appeal and leave the defendant to its remedy by motion, under Section 6 of the Maryland act of 1787, Ch. 9, in force here, which provides for setting aside judgments founded in

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*irregularity* in obtaining the same, and for continuance and retrial of the action. *Appeal dismissed.*

On May 17, 1897, *Mr. Thomas* and *Mr. Duvall*, on behalf of the appellant, filed a motion for rehearing.

On June 17, 1897, the motion was denied. Mr. Chief Justice ALVEY delivered the opinion of the Court:

The motion in this case that the court shall finally dispose of the case on the appeal of the defendant, instead of dismissing the appeal on the motion of the plaintiff under the rule, can not be granted. The rule of court is the law of the court, as it is of the parties, and there is no dispensing power in the court, simply to meet what is supposed to be the pressing exigency of a particular case.

The appeal taken in this case immediately upon the entry of the judgment was in no manner dependent upon the settlement and signing of a bill of exceptions to the ruling of the court upon the evidence. There had been a motion in arrest of judgment, founded upon the distinct ground that there had been no valid or lawful verdict of the jury, and that there could be no valid judgment rendered. That motion was overruled and a judgment was entered; and that presented the question of the validity of the verdict and of the judgment thereon; and if the appeal had been presented to this court in proper time the question of the validity of the judgment so rendered would have been open here on such appeal. But instead of prosecuting the appeal upon that state of the record, delay occurred and a contest arose in the matter of settling the bill of exception, and consequently, the transcript was not filed in this court within the time prescribed by the rule of this court, and the appellee, the plaintiff below, claimed the enforcement of the rule both by motion to docket and dismiss, before the transcript was filed, and by motion to dismiss after the transcript was filed out of time.

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This right to dismiss we have no power to refuse, unless we were to hold the judgment to be an absolute nullity, which we have declined to do on a motion to dismiss the appeal under the rule. The rule would be of no force or effect if the transcript could be filed at any time after the appeal entered. The time prescribed by the rule must be given full force as a limitation of time for filing the transcript; that is the clear meaning and tenor of the rule.

Whether the judgment entered on the verdict can be vacated or set aside by the court below, under the Maryland statute of 1787, after the lapse of the term at which the judgment was entered, as can be done, according to the construction of the statute and the practice thereunder, of the Maryland courts, is a question that cannot influence the court in determining the question as to the right to entertain the appeal. The Supreme Court of the United States in the case of *Phillips v. Negley*, 117 U. S. 665, while holding that an application to the court rendering the judgment to vacate or set aside the judgment for causes mentioned in the statute, can only be made during the term at which the judgment was rendered, have pointed out the methods by which an irregular or voidable judgment may be relieved against; but the appellant must determine what remedy it will invoke.

*Motion denied.*

## THE STANDARD OIL COMPANY v. OESER.

EQUITY PRACTICE; TEMPORARY RESTRAINING ORDERS;  
NUISANCES.

1. The allowance or refusal of an injunction *pendente lite* is largely within the discretion of the trial court, and its order will not on appeal be disturbed unless manifestly erroneous, *following* Electric Lighting Co. v. Metropolitan Club. 6 App. D. C. 536.
2. In a suit by property owners to enjoin an oil company from increasing its plant in a certain neighborhood upon the ground that it would aggravate a nuisance which had existed for five years or more, an order temporarily enjoining the defendant from erecting a proposed new oil tank, and also enjoining it from using any of the previously existing tanks, storehouses, etc., was *modified* by allowing the defendant to continue to use existing structures, and as modified *affirmed*.

No. 666. Submitted May 4, 1897. Decided May 10, 1897.

HEARING on appeal by the defendant from an injunction *pendente lite*. *Modified and affirmed*.

The COURT in its opinion stated the case as follows:

This is an appeal from an interlocutory order of the Supreme Court of the District of Columbia, awarding a temporary injunction pending the suit to restrain an alleged nuisance.

In the year 1891 a foreign corporation, known as the Baltimore United Oil Company, procured permission from the municipal authorities of the District of Columbia to erect a warehouse, stable, two tanks for oil, a small office building, and a boiler house, on the square of ground in the city of Washington designated as square north of square 697, a rather sparsely settled region in the southeastern part of the city, and thereupon proceeded to erect the specified buildings—not, it seems, without some protest from the complain-

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## Statement of the Case.

ant John G. Oeser and others, then already residents of square 697, immediately south of the company's square. In 1892, the Baltimore United Oil Company transferred its rights to the appellant, the Standard Oil Company, which thereupon proceeded to erect another oil tank upon the premises of larger dimensions than those authorized and constructed in 1891, and which has continued ever since that time to use all these oil tanks for the storage of oil, alleged to be of an inflammable and combustible character, and the premises generally for the transaction of its business. It is alleged that, by reason of the danger from explosion, the danger from fire, the offensive odors emitted, and the depreciation thereby of the property of the appellees and others in the neighborhood, the business of the company constitutes a nuisance which should be restrained by injunction, especially in view of the fact that there were in the immediate neighborhood a brick kiln and the roundhouse of the Baltimore and Potomac Railroad Company, by which the danger from fire was greatly aggravated.

In January of the present year, 1897, the appellant company procured from the municipal authorities of the District of Columbia, against the protest of the appellees and other owners of adjacent property, a permit to construct another and yet larger oil tank, which the appellees allege will greatly aggravate the original nuisance and seriously impair their rights; and the company was proceeding with the construction thereof, when it was arrested in its progress by the institution of the present suit, which was commenced by a bill in equity filed by the appellees to restrain the construction of the newly authorized tank, and likewise to restrain the company from the further use of the other tanks and the boiler for the storing of oil therein or the delivery of oil therefrom. Affidavits were filed with the bill in support of its allegations, and a rule to show cause was thereupon issued, and served upon the defendant company.

The company filed an answer, or what purports to be an answer—for its execution seems to have been exceedingly defective—and also numerous affidavits, denying that its operations were in any manner a nuisance calling for the intervention of a court of equity.

The court, however, upon the bill and answer and affidavits, and the rule to show cause, made an order for an injunction to last until the final hearing of the cause, by which, in the first place, the company was enjoined and restrained from the further proceeding with the construction of its proposed new tank, and from using it for the storage of oils, and in the second place, the company was enjoined and forbidden, from and after June 1, 1897, from using any of the previously existing tanks, storehouses, or other buildings in the square, for the storage of oils or for the delivery of oils therefrom for removal from the premises. From this order the company has appealed.

*Mr. Clarence A. Brandenburg* for the appellant:

1. Upon the coming in of the answer of the defendant in this case, positively and emphatically denying all the material allegations of the bill as it does, supported by affidavits with equal emphasis denying the averments of the affidavits filed in support of the bill, absolutely nothing remained but to discharge the rule. *Harris v. Sangston*, 4 Md. Ch. 394; *Dorsey v. Hagerstown Bank*, 17 Md. 408. Anticipated danger from fire is no ground for an injunction to restrain the conduct of any business enterprise. *Duncan v. Hayes*, 22 N. J. Eq. 30; *Rhodes v. Dunbar*, 57 Penn. St. 274; *Dorsey v. Allen*, 85 N. C. 358; *Barnes v. Calhoun*, 2 Iredell Eq. 199; *Dunear v. Hayes*, 22 N. J. Eq. 25; *Mayor v. Radecke*, 49 Md. 218; High on Injunctions, Sec. 742; *Bowen v. Manzy*, 117 Ind. 258; *Lake View v. Litz*, 44 Ill. 81; *Thornton v. Roll*, 118 Ill. 350; *Rouse v. Martin*, 75 Ala. 510; *Rounville v. Kohlheim*, 68 Ga. 668; *McCutchen v. Blanton*, 59 Miss. 116; *Bridge Co. v. Utica R.*, 6 Paige, 554; *Morgan v. Binghamton*, 102 N. Y. 500.

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## Argument of Counsel.

The allegations of the bill with reference to the alleged noxious gases and vapors are wholly insufficient to warrant the granting of an injunction to restrain the existence or erection of a nuisance. *Adams v. Michael*, 38 Md. 134. The alleged depreciation in the value of the property of the complainants as a result of the existence of the lawful enterprise of the appellant is no ground for an injunction. *Rhodes v. Dunbar*, 57 Pa. St. 274; *Atty. Gen. v. Nichols*, 16 Vesey, 337.

Even assuming the existence of the causes of which the complainants complain, the complainants themselves must be injured thereby, and if they are not, they can not be permitted to complain and certainly cannot be permitted to arrest the conduct of a business enterprise preliminary to final hearing. Wood on Nuisances, Sec. 792; High on Injunctions, Sec. 740.

2. An injunction, unless issued after decree, can only be used for the purpose of prevention and protection and not for the purpose of commanding the defendant to undo what he had previously done. *University v. Green*, 1 Md., Ch. 97; *Murdock's Case*, 2 Bland Ch. 471.

3. Greater particularity of allegation is required to entitle a complainant to an injunction against a threatened nuisance, than an existing one. The reasons are obvious and clearly set forth in the authorities hereafter cited. There is no allegation that the proposed tank or structure can not be used for any proper and unobjectionable purpose, or that it could not be used in the oil business even in a way wholly unobjectionable. The facts should have been averred from which the court itself could say whether the anticipated nuisance will be of the character supposed. *Adams v. Michael*, 38 Md. 124; Wood on Nuisances, Secs. 788, 790; High on Injunction, Sec. 743; *Bowen v. Manzy*, 117 Ind. 258.

4. Each and every fact of any importance whatever, upon which the complainants rely in their bill, has been expli-

citly and emphatically denied by the answer. Under such circumstances, but particularly in a case of this character, entailing so serious consequences, it is the invariable practice to discharge the rule issued and to refuse a restraining order before final hearing. *Harris v. Sangston*, 4 Md. Ch. 394; *Dorsey v. Bank*, 17 Md. 408; *Colvin v. Warford*, 17 Md. 433; *Hubbard v. Mobray*, 20 Md. 165; *Alexander v. Ghiselin*, 5 Gill, 138; *Webster v. Hardesty*, 28 Md. 592; *Phila. Trust Co. v. Scott*, 45 Md. 451; *Bellona Co's Case*, 3 Bland, 442; *Lynn v. Iron Co.*, 34 Md. 304.

The answer was in at the time of the hearing and denied the equities of the bill and its averments must be taken as true. *Dorsey v. Bank*, 17 Md. 412; *Trust Co. v. Scott*, 45 Md. 45.

To say the very least, the case presented by the complainants, in view of the denial of the defendant, was doubtful, and under such circumstances, it is the practice of the court to deny the injunction—certainly before final hearing. *Adams v. Michael*, 38 Md. 129; *Rouse v. Martin*, 75 Ala. 510.

5. Wholly independent of the question how far the failure of the complainants to take any action to prevent the erection originally, and after erection, the use, by the defendant of its plant and buildings would operate upon final hearing to completely bar the relief now sought by them, their delay under the circumstances appearing in this case is not merely persuasive, but conclusive upon the complainants that no urgent or imperious necessity exists for a restraining order, preliminary to final hearing, to arrest the conduct by the defendant of its large business enterprise in the District of Columbia. *Simpson v. Justice*, 8 Ired. Eq. 115; *Southard v. Canal Co.*, 1 N. J. Eq. 522; High on Injunctions, Secs. 756, 786; *Tichenor v. Wilson*, 8 N. J. Eq. 197; *Reid v. Gifford*, 6 Johns. Ch. 20; *Weller v. Smeaton*, 1 Cox. Ch. Rep. 102; *Parker v. Winnipiseogee Co.*, 4 Black, 545; *Railroad Co. v. Strauss*, 37 Md. 237.

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Opinion of the Court.

*Mr. C. Maurice Smith* and *Mr. Edwin Forrest* for the appellees.

Mr. Justice MORRIS delivered the opinion of the Court :

The general inexpediency of appeals from interlocutory orders, although authorized in special cases by the statute, is well illustrated in the present instance by the fact that, before the mandatory injunction provided for in the second clause of the order here appealed from, and which is that which most seriously affects the appellant, could by its own express terms go into effect, testimony might have been taken and the cause heard upon its merits, if ordinary diligence had been had in its prosecution. Yet, as we have said, the case is one in which the statute authorizes an appeal from the interlocutory order rendered in it.

We have to deal in the cause with that most unsatisfactory of all legal contests, a battle of affidavits, from which there is almost always absent the test of truth furnished by regular examination and cross-examination of witnesses. And we have likewise to deal with that which is necessarily more or less a matter of discretion with the court below. For the allowance or refusal of an injunction *pendente lite* is not always to be determined by rigid rules, invariable and immutable in their application; nor does it depend wholly or exclusively even upon the preponderance of evidence, but upon the sound discretion of the court and the inherent probabilities and possibilities of the case under consideration according to its own circumstances, although of course the complainant must always show a *prima facie* case for it. *Reddell v. Bryan*, 14 Md. 444; *Roberts v. Anderson*, 2 Johns. Ch. 202; *Sheldon v. Rockwell*, 9 Wis. 167; *Potter v. Chapman*, Ambler, 99, by Lord Chancellor Hardwicke.

What we said in the case of *The Electric Lighting Company v. The Metropolitan Club*, 6 App. D. C. 536, is applicable here. There it was said: "An injunction *pendente lite* is

only a conservative measure intended to preserve existing conditions and to save all rights until the merits of the controversy can be judicially ascertained by such proofs as the parties may be able to adduce."

And again: "We should not lightly disregard the action of the court below, or reverse that action, unless it is made very plain to us either that such action was erroneous, or that it is in the interest of justice that it should be vacated. One who appeals from a merely interlocutory order should therefore show a very strong case to overthrow action intended in its very nature to give the court reasonable opportunity to determine the question of right in the controversy between the parties."

Reference also may be had in the same connection to the cases of *Parker v. Winnipiseogee Co.*, 2 Black, 545; *Irwin v. Dixion*, 9 How. 28; *Great Western Rwy. Co. v. Birmingham, etc., Rwy. Co.*, 2 Phillips, 602; *Andre v. Redfield*, 12 Blatchf. 408; *Peterson v. Matthis*, 3 Jones (N. C. Eq.), 31.

Now, while in one aspect of this case a difficulty is presented by the apparent acquiescence of the appellees for five years and upwards in a situation which they now regard as a dangerous nuisance, it is very clear that a condition of things, which common experience shows not to be free from the dangers which they apprehend, may be very greatly aggravated by the construction of new and larger works, and by an increased accumulation of inflammable and explosive materials. It may well be that parties will acquiesce in a small annoyance, while aggravation of such annoyance will constitute an intolerable nuisance such as to justify a recourse to the courts for protection. The statements of the bill of complaint in this regard undoubtedly presents a *prima facie* case for temporary injunction; and we think that the court below was fully warranted in its assumption that it should prevent for the time the construction of the new works projected by the appellant and preserve the existing conditions until due inquiry should be

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had into the rights of the respective parties in the due course of legal procedure.

But there is in the order of the court below not only the conservative provision stated in the first clause of the order for the preservation of existing conditions, but also in the second clause a provision for a mandatory injunction that has the effect of decreeing a total cessation of the appellant's business upon its premises after June 1, 1897. For this, we find no sufficient warrant in the bill of complaint. That bill does not state such a cause of apprehension of impending disaster or peril as would justify this extraordinary remedy. The business of the appellant has been carried on for five years and upwards without serious injury to the appellees, and without protest from them—certainly without any legal action taken by them to abate the prosecution of the business as a nuisance. There is no ground shown for an immediate and radical change in the situation such as a mandatory injunction of this kind would work.

In the case of *Cole, etc., Co. v. Virginia, etc., Co.*, 1 Sawy. 470, Mr. Justice Field said, "that a mandatory injunction will not be granted upon motion, except where irreparable injury will result before a final decree can be entered."

There is no showing in the present case of any such irreparable injury as likely to result before final decree; and it is not apparent how there well could be, in view of the fact that there has been apparently no substantial change in the situation for upwards of five years, and the appellees during all that time have acquiesced in it.

From what we have said, it follows that, in our opinion, the order appealed from should be modified by the omission therefrom of the second clause, and that with such modification it should affirmed. The cause, therefore, will be remanded to the Supreme Court of the District of Columbia, with directions to vacate so much of said order as is contained in the second clause, and which purports to

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enjoin and restrain the appellant from the use of its property, as therein specified, from and after June 1, 1897, and for such further proceedings in the cause as may be just and proper. Each party will pay his own costs on this appeal. *And it is so ordered.*

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## HUTCHINS v. MANEELY.

## PRACTICE; SEVENTY-THIRD RULE; AFFIDAVITS.

1. This court will not be disposed to question under any circumstances a decision of the General Term of the Supreme Court of the District of Columbia upon a question of practice.
2. An affidavit under the 73d Rule of that court may be made before the notary public of a State, and is sufficiently authenticated by his signature and seal.

No. 658. Submitted April 13, 1897. Decided May 11, 1897.

HEARING on an appeal by the defendants from a judgment under the 73d Rule of the Supreme Court of the District of Columbia. *Affirmed.*

The facts are sufficiently stated in the opinion.

*Mr. Myer Cohen* and *Mr. Adolph G. Wolf* for the appellants:

The court below erred in overruling the motion to strike out the plaintiff's affidavit. A notary public has no authority under the common law to administer oaths. The authority must be derived from a statute. *Proffat on Notaries*, Sec. 24; *Keefer v. Mason*, 36 Ill. 406; *Benedict v. Hall*, 76 N. C. 113.

No statute of the United States, to the knowledge of counsel, authorizes a notary public outside of the District of Co-

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lumbia to take an affidavit for general purposes. He is authorized to take depositions *de bene esse*, likewise to administer oaths in special cases, and he is authorized by Section 1778 of the Revised Statutes of the United States to administer oaths in all cases in which, under the laws of the United States, oaths may be taken or made before any justice of the peace, or any commissioner of the circuit court of any State or Territory, but he has no general authority. Without such authority in the officer administering the oath, no indictment for perjury would lie against an affiant swearing falsely. *U. S. v. Curtis*, 107 U. S. 671.

That case is also authoritative to the effect that a notary public has no greater authority than a justice of the peace or a commissioner of the circuit court. But neither of these last named officers outside of the District of Columbia has authority to administer an oath for general purposes, such an oath for example as is required by the 73d Rule of Practice of the Supreme Court of the District of Columbia. In the present case, moreover, it does not appear that a notary public is authorized by the laws of Pennsylvania to administer oaths; there is no proof that Calvin F. Heckler is the officer he purports to be.

As an officer of the commercial world for the purposes of authentication of copies and protest of bills and notes, the seal of a notary public is universally recognized, but that seal does not import the power to administer oaths. *Keefer v. Mason*, 36 Ill. 406; *Benedict v. Hall*, 76 N. C. 113.

*Messrs. R. Ross Perry & Son* for the appellee.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

There is no ground whatever to justify this appeal, and the judgment appealed from must therefore be affirmed.

The only question presented is, whether an affidavit made of the cause of action to be filed with the declaration, under Rule 73 of the court below, can be made before a notary public, in the State of Pennsylvania, and whether the affi-

davit is sufficiently authenticated by the signature and seal of the notary.

There seems to have been a long settled practice in the courts of this District to receive such affidavits made before notaries in the States, and the question as to their sufficiency under the rule appears to have been expressly decided by the Supreme Court of the District in General Term, in the case of *Denmead v. Maack*, 2 MacA. 475. In that case, it was held that an affidavit taken before a notary public in the State of Maryland was sufficient, and that no other verification of the qualification and act of the notary was required than was furnished by his signature and seal of his office. That case, relating to a question of practice, we should not be disposed to question under any circumstances, but the decision seems to be fully warranted both by statute provision and the decisions of the Supreme Court of the United States.

By the act of Congress of August 15, 1876, it is declared that "notaries public of the several States, Territories, and the District of Columbia, be and they are hereby authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits in the same manner and with the same effect as commissioners of the United States circuit courts may now lawfully take or do." It is not contended that the commissioners mentioned in this act can not take affidavits.

In the case of the *United States v. Curtis*, 107 U. S. 671, it was held that an indictment for perjury against an officer of a national bank, for a willful, false declaration or statement in a report made under Section 5511 of the Revised Statutes, was bad, if prior to the passage of the act of February 26, 1881, Ch. 82, his oath verifying the report was taken before a notary public appointed by a State, as such notary had, at that time, no authority under a law of the United States to administer the oath in such cases. The question

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in that case turned upon the construction of Section 5392 of the Revised Statutes of the United States. It was held that that section did not confer authority upon the notaries public of the States to administer the oaths required of the bank officer under the statute. But it does not follow that such notaries have no power to administer oaths or take affidavits in other cases. It is shown to the contrary of that in the case of *Harris v. Barber*, 129 U. S. 366, in which case it was held, that under the Landlord and Tenant Act of the District of Columbia, requiring a "written complaint on oath of the person entitled to the possession of the premises to a justice of the peace," the oath could be taken before a notary public outside of this District. The signature and seal of the notary sufficiently verified the affidavit.

*The judgment is affirmed.*

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THE UNITED STATES, EX REL. BERNARDIN,

v.

SEYMOUR.

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MANDAMUS.

A judgment dismissing a petition for a writ of *mandamus* to the Commissioner of Patents, *affirmed*; following *Bernardin v. Seymour*, 10 App. D. C. 296.

No. 682. Submitted May 10, 1897. Decided May 11, 1897.

HEARING on an appeal by the relator from a judgment dismissing a petition for a writ of *mandamus* to the Commissioner of Patents. *Affirmed.*

*Mr. J. C. Dowell* for the appellant.

*Mr. W. A. Megrath* for the Commissioner of Patents.

Mr. Justice SHEPARD delivered the opinion of the Court:

The allegations of the petition for the writ of *mandamus* prayed for in this case to Benjamin Butterworth, Commissioner of Patents, are substantially the same as those contained in the former petition filed by the same plaintiff, Alfred L. Bernardin, against John S. Seymour, Commissioner; and the same may be said of the returns made by each defendant to the writ. There is one error in the petition concerning the ending of the former suit, however, that should be noted. The allegation is that the former suit abated in this court because of the retirement of Commissioner Seymour from the said office and the succession of Commissioner Butterworth. The change in the office did not occur until April 12, 1897, and the judgment in the former case, affirming the judgment appealed from, on March 1; and the mandate was issued to the court below on April 10, after a motion for reargument had been overruled.

The case has been submitted on the argument made in the former case, and involves but the one question, namely, the constitutionality of the act of Congress conferring upon this court the jurisdiction to entertain appeals from the decisions of the Commissioner of Patents in certain cases.

For the reasons given in that case (10 App. D. C. 296), the judgment must be *affirmed, with costs; and it is so ordered.*

## KOPPEL v. DOWNING.

## COPYRIGHT.

1. Where the proprietor of a manuscript translation of a play licenses a theatre manager to use the translation for a specific purpose, the licensee can not confer upon a printer and publisher of the play the power to copyright it, and a copyright so attempted to be taken out is invalid.
2. Nor can the proprietor of the manuscript, in such a case, in a suit brought by the printer and publisher against one whom he claims to be infringing his alleged copyright, by adoption constitute the plaintiff a trustee for himself upon an agreement to share the recovery with him. The policy of the law is against such disguises and they will not be encouraged by the courts.
3. Where the owner of a manuscript, after filing with the Librarian of Congress copies of the title page, neglects to perfect his copyright by filing copies of the published work as required by law, and by such neglect abandons his right, that right can not, sixteen years afterwards, be revived by authorizing somebody else to apply for and obtain a copyright in a name different from that of the real proprietor.

No. 688. Submitted February 12, 1897. Decided May 25, 1897.

HEARING on an appeal by the plaintiff from a judgment on a verdict directed by the court in an action to recover penalties for the alleged infringement of a copyright. *Affirmed.*

The facts are sufficiently stated in the opinion.

*Mr. Charles C. Lancaster* and *Mr. Jackson H. Ralston* for the appellant:

1. Section 4952, Rev. Stats., does not define the amount of interest a party should have to constitute him the proprietor of a dramatic composition, and, therefore, any substantial interest is sufficient to give the owner of a copyright the legal title to the same against all parties having, or claiming,

no interest or ownership in the original composition. *Hanson v. Jewelry Co.*, 32 Fed. Rep. 202.

2. It will depend on the terms of the agreement between the publisher and the author whether the latter has a copyright in his work, or whether such copyright belongs to the former. Where there is an express agreement, the terms of the agreement determine the fact; and where there is no express agreement, the intention of the parties may be determined by the attending circumstances. *Little v. Gould*, 2 Blatch. 165; *Boucicault v. Fox*, 5 Blatch. 87; *Lawrence v. Dana*, 4 Cliff. (U. S.) 1. Not only was there an express agreement in this case, but all the attending circumstances show the intention of Pope, Palmer, and the appellant to constitute the latter the proprietor of the dramatic composition when he took out the copyright.

3. When the proprietor of a copyright relies upon a legal title he is bound to set it forth, and it must appear to be at least *prima facie* valid. But it has also been held that there are cases in which an equitable title is sufficient to entitle its possessor to protection in this form. *Little v. Gould*, 2 Blatch. 181; *Pulte v. Derby*, 5 McLean (U. S.), 328.

When it appears that the copyright has been secured in the manner prescribed by the statute, and that it is the property of the plaintiff, a *prima facie* case is made out, and the burden is on the defendant to show that the copyright is invalid, or the plaintiff's title defective. Drone on Copyright, 499. "*Prima facie*," says Mr. Justice Story, "the copyright confers title; and the onus is on the other side to show clearly that, notwithstanding the copyright, there is an intrinsic defect in the title." 2 Story Eq. Jur., Sec. 936, note 6.

Pope, by authorizing the dramatic composition to be copyrighted as it was, is estopped from denying that Koppel is the proprietor within the meaning of the copyright law, if he should so desire. But, on the contrary, he admits the proprietorship of the copyright in Koppel. No one else has

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## Argument of Counsel.

shown any interest sufficient to contest Koppel's right, as established by the Librarian of Congress. No proof whatever was given by the appellee denying the allegations of the declaration or to contradict the proof introduced by the appellant. The facts as proven are therefore admitted.

4. It is admitted by appellee that he performed for a consideration the play of "Samson," as copyrighted by the appellant, thirty-three times in various theaters in the United States without the consent of the proprietor thereof. The appellant was therefore entitled to judgment for the damages provided in Sec. 4966, R. S. *Boucicault v. Fox*, 5 Blatch. 87.

There the action was for the violation of the copyright of a play called the "Octoroon," by performing said play nine times, and a verdict was rendered for the plaintiff for damages, as provided by the statute.

*Mr. James S. Edwards* and *Mr. Job Barnard* for the appellee:

1. If the plaintiff is the proprietor of this copyright as claimed, then the contract made between him and Pope, whereby Pope was to employ counsel, pay all costs and have two-thirds of the amount of recovery, is a champertous contract and void. *Johnson v. Van Wyck*, 4 App. D. C. 294. Champerty is defined to be a species of maintenance, being a bargain with a plaintiff to divide the land or other matter being sued for between them if they prevail at law, whereupon the champertor is to carry on the suit at his own expense. *Manning v. Sprague*, 148 Mass. 20.

2. As matter of fact, Koppel has no right to maintain this suit, because he does not come within the class of persons authorized by the statute (Sec. 4952) to have a copyright, and thus to have the "sole liberty of publicly performing or representing" the dramatic composition. He is not, and was not at the time he filed the title page and copies, either the author or proprietor of said dramatic composition, or the executor, administrator or assignee of any such person.

Mr. Palmer, who was a mere licensee, had no right to take out a copyright, much less to authorize a stranger to do so in his own name.

A "proprietor" is one who has acquired the *exclusive* right of some native author. *Yuengling v. Schile*, 20 Blatchf. 452, 461. Koppel never bought this composition or translation; it was never assigned to him; it was not a donation to him. He only had a contract with Palmer to print it, for which he was fully paid. He never claimed any right to control its performance by anybody, and never performed it himself, and the law certainly does not contemplate that the defendant shall be liable to pay him damages for an infringement of a right he never possessed.

3. In this case, Pope had failed to perfect his copyright, and had given Palmer license to use and print the play; and Koppel having no proprietorship in the play itself, could not legally copyright it as his own; it therefore follows, that his publication and distribution of the same all over the country, has the effect of making this play public property, and the right to copyright is lost. *Clemens v. Belford*, 14 Fed. R. 728; *Drone on Copyrights*, 577, 616. The failure to make publication and to file the two copies required, within a reasonable time after filing the title page, operates as an abandonment, and loses the author or proprietor the right to copyright. *Boucicault v. Hart*, 13 Blatch. 47, 54.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

The plaintiff, Charles D. Koppel, the present appellant, brought this action against the defendant, Robert Downing, to recover the penalties prescribed for the alleged infringement of a copyright, the copyright being alleged in the declaration to belong to the plaintiff as proprietor. The subject of the alleged copyright is the translation of a certain dramatic composition known as "Samson," the original of

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which in Italian was the work of Ippolito D'Aste, and which has been translated into English by W. D. Howells. It is alleged that the defendant, without license, publicly performed the play thirty-six times, under the title of "Samson and Delilah," and thus infringed the plaintiff's copyright.

The defendant pleaded the general issue, not guilty, under which plea all matters of defense were admissible. Rev. Stat. U. S., Sec. 4969. The case was tried before a jury, and resulted in a verdict for the defendant. The verdict was returned under the instruction of the court, and that instruction forms the subject of the only exception taken in the case, and the ruling thus excepted to is the only error assigned.

The court, below in quite an extended and very clear opinion, passed upon several questions supposed to be involved in the instruction given (24 Wash. Law Rep. 342); but we do not deem it necessary to review all the questions that were considered and decided by the learned justice below. The first and principal question is, whether the plaintiff had such proprietary right and interest in the manuscript of the translation of the dramatic composition known as "Samson," as to entitle him to acquire copyright therein, under the statute, and the consequent right to maintain this action for an infringement of that right.

There are several sections of the Revised Statutes of the United States that have relation to the question here presented, and which are as follows:

"Sec. 4952. The author, inventor, designer, or *proprietor* of any book, map, chart, dramatic or musical composition, etc., and the executors, administrators, or *assigns of any such person*, shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and, in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others. . . .

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"Sec. 4955. Copyrights shall be assignable in law by any instrument of writing, and such assignment shall be recorded in the office of the Librarian of Congress within sixty days after its execution; in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice.

"Sec. 4956. No person shall be entitled to a copyright unless he shall, on or before the day of publication, in this or any foreign country, deliver at the office of the Librarian of Congress, or deposit in the mail within the United States, addressed to the Librarian of Congress, at Washington, a printed copy of the title of the book, map, chart, dramatic or musical composition, engraving, cut, print, etc., for which he desires a copyright, nor unless he shall also, *not later than the day of the publication thereof*, in this or any foreign country, deliver at the office of the Librarian of Congress, at Washington, or deposit in the mail within the United States, addressed to the Librarian of Congress, etc., *two copies of such copyright book, map, chart, dramatic or musical composition, etc.*: . . . *Provided, nevertheless*, that in the case of books in foreign languages, of which only *translations in English are copyrighted*, the prohibition of importation shall apply only to the translations of the same, and the importation of the books in the original language shall be permitted.

"Sec. 4966. Any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof, or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, *not less than one hundred dollars for the first, and fifty dollars for every subsequent performance*, as to the court shall appear to be just."

It is for the penalties or measure of damages prescribed under this last section that this action is brought.

It is shown in proof, and about which there is no dispute, that a Mr. Pope, a theatrical manager, employed W.

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## Opinion of the Court.

D. Howells, in 1874, to translate for him the Italian tragedy, entitled "Samson," by D'Aste. Pope, on obtaining the translation, played it in St. Louis and other places without printing it. He also undertook to copyright this translation in his own name, and, for that purpose, he filed a title page with the Librarian of Congress in 1874. It appears, according to his own testimony, that he had supposed that he had effected such copyright, but it turned out some twenty years afterwards, upon making demand of the defendant for compensation for alleged infringement, that no copies of the translation of the tragedy had ever been filed with the Librarian, as required by the statute, and consequently no copyright had ever been acquired by Pope. But in 1889, Pope gave A. M. Palmer, a theatre manager of New York, license to use the translation of "Samson," during the artistic tour of Salvini in this country, and Palmer employed the plaintiff to print the play, the latter having nothing whatever to do with the performance of it. According to the arrangement made, Pope was to receive ten per cent. on sales of librettos made by Palmer, but it seems the terms of the arrangement were never observed, and Pope entirely neglected the matter, until his attention was called to it in December, 1893, by an interview published in a newspaper, when he wrote to the defendant upon the subject, claiming the copyright. Finding that he had no ground for such claim, he applied to Palmer, and learned from him that the plaintiff had printed the play and had obtained a copyright therefor in his own name. This led to an interview between Pope and the plaintiff, and, it seems, that they came to an understanding in regard to proceedings against the defendant, whereby it was agreed that Pope should employ counsel, pay costs of suit, and prosecute the defendant in the plaintiff's name—the latter to receive one-third of the damages that might be recovered, and Pope the other two-thirds. Both the plaintiff and Pope testified as witnesses in the case; Palmer did not testify.

The plaintiff testified to his making application for and obtaining certificate of copyright of "Samson, a tragedy in five acts, by Ippolito D'Aste, translated by W. D. Howells, with English and Italian words, as performed by Signor Salvini," of which the plaintiff claimed to be proprietor. He then proceeds to say: "The manuscript was delivered to me by Mr. A. M. Palmer, theatrical manager and owner of Palmer's Theatre, New York City, with instructions to publish and copyright the same for the benefit of all persons concerned. Col. Pope owned this manuscript at the time I published it. I am not proprietor of this manuscript, and it is not in my hands or under my control. I paid no money for the manuscript except the expense of publishing it. Mr. Palmer got the profit on the publication; Mr. Palmer paid me for printing it. I published it under a contract with Mr. Palmer, who was to pay me, by check or any other usual method, a certain amount per thousand for the printing of these librettos. All I had invested in the matter was the cost of printers' work and printing. I knew nothing about Mr. Palmer's title to this work, and I had never seen Mr. Pope at the time I published this play.

"I would be hurt by the playing of this dramatic composition by the defendant, because I delivered the copies to Mr. Palmer, who sold them at his different theatres, and his playing and selling the librettos would be hurt. I understood that I was to do all the printing; I simply followed and obeyed Mr. Palmer's orders in copyrighting and in printing. I did not know of my own knowledge anything about the infringement by the defendant, but was informed thereof by Mr. Pope. I did not communicate at all with Mr. Downing. Mr. Pope employed counsel, who brought the suit. I have a money interest in this suit; don't know exactly how much; a certain proportion of the recovery—one-third. I have not paid any part of the expenses of suit; such expenses have been paid by Mr. Pope. The Italian version of this play was handed me at the same time as the

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translation, and they were published in one book. I understood that the Italian had been published in this country many years before. The copyright sued on here was taken out by me at the request and injunction of Mr. Palmer, who agreed with me that I was to do all the printing, and nobody else, at a certain price, and I got my pay for all I printed. Mr. Pope had the interest in the dramatic performance of this play."

He further says: "I went to a very considerable expense in having these librettos printed, and, as I remember, expended the sum of eight hundred dollars. I understood that I was the proprietor of the manuscript, having a special interest in it for the purpose of publication."

Mr. Pope, as a witness, said: "I have been a theatrical manager and an actor and have been the owner of a theatre in St. Louis. Signor Salvini, as a courtesy to me, furnished me with a copy of the Italian version of the tragedy called 'Samson,' giving me permission to have it translated into the English language. In the year 1874 I employed W. D. Howells to translate this play into English, paying him for the work of translation \$1,000. The work was in manuscript and never published. I performed the play called 'Samson' in the city of St. Louis, in 1874, and at various other cities and at various other times in the United States and Canada. In the spring of 1889, at the request of Mr. A. M. Palmer, lessee and manager of Palmer's Theatre, New York City, I furnished him with the manuscript translation of 'Samson' by W. D. Howells, with the instruction that it should not be played unless copyrighted, and that he, Palmer, should have it copyrighted, and this Palmer agreed to do. I lost trace of the play after placing it in Mr Palmer's hands. I was to receive a certain percentage on the sale of all librettos. I should not have furnished the play for printing except for the distinct understanding that it should be copyrighted. The first I heard of the copyright being infringed was in the fall of 1893, when I was in-

formed that this play was being produced in St. Louis by Robert Downing and a troupe." The witness wrote to Downing upon the subject, and the latter replied denying witness' right to the play. The witness further testified: "I had learned before placing the play in Mr. Palmer's hands that the copyright which I supposed I had taken out in 1874 by filing the title page with Librarian had failed for want of filing copies. I gave the privilege to Mr. Palmer of having the play produced by Salvini in this country with the absolute understanding that it should be copyrighted if he should publish it. I did not know Mr. Koppel, and only made his acquaintance after I discovered that Downing was playing the tragedy. I insisted on Mr. Palmer having the play copyrighted, when I was still under the impression that I had a good copyright, and had a proprietary right in my play. I had parted with it only temporarily to Palmer, and thought I had ownership in it. I had not seen the libretto and did not know that Palmer had complied with my request to have the play copyrighted until I made inquiry. I only made the assignment to Palmer specifically for the Salvini production." He then says: "I employed counsel and brought this suit. I expect to receive several thousand dollars as my share in the recovery. There is a division of the matter between Mr. Koppel and myself. He is to receive about one-third; not less than that, at any rate."

It was shown in proof, and admitted on the part of the defendant, that the latter had acted the play thirty-three times for admission fees.

It was upon this state of the case, as shown by the plaintiff, that the court instructed the jury to find for the defendant.

It is manifest according to well defined meaning of terms, that the plaintiff at the time he applied for and obtained a registry of copyright of the play, in his own name, was neither the author nor proprietor of the dramatic composition called

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"Samson," or of the translation thereof, and had not "the sole liberty of printing, reprinting, representing, publishing, copying and vending the same, or of publicly performing or representing it, or causing it to be performed or represented by others." Indeed, he had no proprietary right or interest in it at all. The statute here involved must be construed as other statutes are construed, and the terms employed to describe persons entitled to the benefit of the statute must be allowed their ordinary and well defined meaning. The term "proprietor" has a well defined meaning, and, according to lexicographers, its meaning is "one who has the legal right or exclusive title to anything, whether in possession or not; an owner; as the proprietor of a farm or mill." Webster Dict. And Worcester defines the term "proprietor" as meaning "a possessor in his own right; an owner; a proprietary." Worcester Dict. It is certainly clear that Palmer, as a mere temporary licensee in the use of the manuscript of the play (he was not an assignee of it), without special authority from the proprietor to act as his agent, had no right to take out a copyright of the translation of the original work, and of course, no authority to confer upon a stranger the right to do so in his own name. It is true, there are many cases in the books where authors and proprietors of manuscripts have authorized publishers and printers to apply for and obtain copyright in their own names; but those cases are founded upon express contracts and in privity with the author or proprietor of the manuscript; not cases where the party obtaining the copyright in his own name was an entire stranger and wholly unknown to the real proprietor, and without any proprietary interest whatever in the manuscript. According to the testimony of Pope, he did not intend when he loaned the manuscript to Palmer for mere temporary purpose, to part with it or divest himself of his proprietary right in the manuscript. He says that he supposed at the time that he had a perfected copyright in himself, and he so informs the defendant in

his letter of December 26, 1893, in which he claims the copyright to be in himself. Whatever understanding he may have had with Palmer, in respect to having the play copyrighted, he could not have intended to have the play subject to a double copyright, one in himself, and another under a different claim, and in the name of a stranger in whom existed no sort of proprietary right. The interest of the plaintiff was not that of proprietor of the manuscript, but that of a printer or publisher only. He was not entitled, therefore, to obtain a copyright under the statute to protect that interest only. It would be in plain contravention of the meaning and policy of the statute to maintain the validity of a copyright obtained for such purpose, and under the circumstances that the present was obtained. It is true, the real proprietor of the manuscript has attempted, by a retroactive adoption, to constitute the plaintiff a kind of trustee; but that was only an expedient resorted to for the purposes of this suit, brought to recover penalties supposed to have been incurred for infringement of the copyright. The litigation, while in the name of the party obtaining the copyright, without proprietary interest, is really carried on by and at the expense of the proprietor, and for his benefit. The policy of the law is against such disguises, and they should not be encouraged by the courts. The law of copyright, while securing a long continued monopoly, contemplates, and the policy of it requires that the public should have notice, by a true and correct official registry, as to the real author or proprietor entitled to the enjoyment of such monopoly as against the public. The courts should not encourage or support false claims to title to copyright.

But there is another ground for holding that the plaintiff did not acquire a valid title to the alleged copyright; and that is, that the title to such copyright had been abandoned by Pope, under whom the plaintiff claims, if he has any claim at all.

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It is not pretended that the right of the manuscript was ever assigned to the plaintiff for consideration, without notice, or that such right was ever donated to him. All that he claims is that he only had a contract with Palmer to print the manuscript, for which he was fully paid. He never claimed any right to control the performance of the play by anybody, and never performed it himself. He therefore could claim to stand in no better position nor to occupy any higher ground, in a legal sense, than the proprietor, Pope, himself. And if Pope had failed and neglected to perfect his copyright as originally claimed, and by such failure and neglect abandoned such right, that right could not be revived by authorizing somebody else to apply for and obtain a copyright in a name different from that of the real proprietor, sixteen years after the filing of the title page by the proprietor himself, under Section 4956, R. S. U. S.

This principle, and construction of the statute, was strongly enforced in an opinion by the late Mr. Justice Hunt, in the case of *Boucicault v. Hart*, 13 Blatchf. 47, 54, referred to and quoted from in the opinion of the court below. In that case the plaintiff had filed the title page of his work, but had not followed it up by depositing the two printed copies as required by the statute. A bill was filed for an injunction, and the plaintiff claimed that the copyright was sufficiently perfected by filing the title page only, to entitle him to relief. But the learned justice said:

"The author shall not be entitled to a copyright unless, within ten days from the publication, he shall deliver two copies to the Librarian. It is not a fair interpretation of this section to hold that the filing of the title page entitles him to a copyright fully and absolutely, and that this may be defeated by a publication and failure to deliver two copies, but as long as there is no publication, although it continue indefinitely, there is no lapse of the right. This construction is not permitted either by the idea which secures bene-

fits to the author or inventor, upon the theory that the public is to be benefited, as well as himself, by his works, or by the principle pervading all this branch of the law of patents, trademarks and copyrights; that an author or inventor must put his claim in the form of a well defined specification, work or composition, and so place it on record, so that he cannot alter it to suit his circumstances, and so that other authors and inventors may know precisely what it is that has been written or invented." And continuing, the learned justice said: "The principle I conceive to be the same in regard to a copyright, and I hold that, to secure a copyright of a book or dramatic composition, *the work must be published within a reasonable time after the filing of the title page, and two copies be delivered to the Librarian.* These two acts are, by the statute, made necessary to be performed and we can no more take it upon ourselves to say that the latter is not an indispensable requisite to a copyright, than we can say it of the former." See, also Drone on Copyright, page 615.

If by neglect and long delay (now more than twenty years) Pope had lost the right to follow up and complete his title to copyright, initiated in 1874, it would be wholly inadmissible to allow him now to secure the benefit of that which he has abandoned, by adopting, for a special object, the copyright granted to another person without his authority. It is clear, we think, that there is no ground for the present action, and that the judgment of the court below must be affirmed; and it is so ordered.

*Judgment affirmed.*

## WASHINGTON AND GEORGETOWN RAILROAD CO.

v.

## GRANT.

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STREET RAILWAYS; NOTICE; NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE; PLEADING AND PRACTICE; VARIANCE.

1. If a street car stops at a place where passengers may get off and on, although not a regular stopping place, it is the duty of those in charge of the car to hold it a sufficient time for passengers, by the exercise of reasonable diligence, to alight or get on in safety, and must in any event see and know that no passenger is in the act of alighting, or is in a position otherwise which would be rendered perilous by the motion of the car when again put in motion; and if an employee fail in his duty in any of these respects, the company employer is liable for injuries resulting to a passenger.
2. Where there is conflict of evidence in such a case as to whether there was negligence on the part of the railroad employee, the question is one for the jury, and whether the testimony preponderates the one way or the other is also exclusively for the jury and not for the court to decide.
3. Actual or express notice by a passenger to the conductor of the car of an intention to alight is not required, if the conductor knew that the passenger was in the act of alighting, or if he did not know but ought to have known the fact, under all of the circumstances, the company would be liable; and an instruction that in such a case the passenger as a matter of law cannot recover if he failed to give notice to the conductor, is properly refused.
4. As a general rule, it is only where the circumstances of a case are such that the standard and measure of duty are fixed and defined by law and are the same under all circumstances, or where the facts are indisputable, and but one reasonable inference can be drawn from them, that the court can declare as matter of law that there is such contributory negligence as will defeat an action; ordinarily the question of negligence is a question of fact for the jury.
5. A variance between the allegations of a declaration and the proof, to be material, must be such as could have misled or operated to the surprise of the defendant.

No. 664. Submitted April 15, 1897. Decided May 25, 1897.

HEARING on an appeal by the defendant from the judg-

## Statement of the Case.

[11 App.]

ment on verdict in favor of the plaintiff in an action to recover damages for personal injury. *Affirmed.*

The COURT in its opinion stated the case as follows:

This action was brought to recover for personal injuries received by the plaintiff, Leonidas W. Grant, occasioned, as alleged, by the negligence of the agents and servants of the defendant, the Washington and Georgetown Railroad Company, a street railway company in the city of Washington.

The facts of the case, as they are stated, appear to be these: On the 19th of January, 1895, the plaintiff took a Fourteenth street car at Third street and Pennsylvania avenue, northwest, on his way to the Navy Department, where he was employed; that a Mr. Hall, also employed in the same department, and himself were the only passengers on the car at the time of the accident; that, after turning into Fifteenth street from Pennsylvania avenue, the car stopped, then started again, and began to slow up as it approached the transfer station at G street; that, upon its so slowing up, both the plaintiff and Hall arose from their seats, and Hall passed out of the front end of the car; and the plaintiff through the rear end out to the platform; that plaintiff stepped on that part of the platform next to the step that led down from it, and stood there waiting until the car came to a stop, when he stepped to the ground; that the car stopped on Fifteenth street, just south of G street, opposite the Riggs House, at what he supposed was the regular stopping place, and that he waited on the platform until it stopped, holding, according to his recollection, the rail on the body of the car; that, just as he made the step, he felt himself jerked, and remembered nothing more until he found himself crawling about on the ground; that every time he would get up, he would fall again, until a young man came to his assistance and carried him into the Riggs House, from which he was taken home in a carriage. His injuries are described as being very severe, and his loss

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considerable. The plaintiff further testified, on cross-examination, that he supposed the place where the car stopped to be the regular stopping place, because he saw the flagman, the transfer station, and the general surroundings; that his recollection of the manner in which the accident occurred is indistinct, such indistinctness of recollection beginning at the point of stepping from the platform; that he got down on the step just about the time the car stopped; that the conductor was standing right near him upon the rear platform, when he came out upon it; and when he stepped from the platform to the step, the car was slowing up, and he stood ready to step off when it stopped; that he supposed the jerk took place after he got on the street, and while he had hold of the handle-holt; that, just as he stepped to the pavement, he felt the jerk forward and fell; that the car jerked him just as he stepped down; that he did not think it was necessary to notify the conductor that he was going to get off; that he supposed it was the regular stopping place, and when the car stopped he got off, as he always did, without notifying the conductor; that the conductor was standing there on the platform as the plaintiff descended the steps. This is the full and particular account of the occurrence as given by the plaintiff himself. There were other witnesses who testified on his behalf, and whose testimony tended to corroborate his account of the accident. The evidence on the part of the defendant, given by the conductor, the gripman, and the station agent, was in striking conflict with that of the plaintiff in many particulars. It was testified by one of the witnesses for the plaintiff that the car stopped on the south side of G street, in front of the Riggs House, on this occasion, because, as the car approached G street, there was an express wagon passing on that street, just in front of the car; and by another witness for the plaintiff, it was proved that the train stopped in front of the Riggs House on that occasion, because another and preceding train of the defendant had stopped and was stand-

ing in front of the transfer station on the north side of G street.

The witnesses for the defendant proved that the car producing the accident made no stop in front of the Riggs House, but passed it at the regular rate of speed; that there was no train ahead of the train on which the accident is supposed to have occurred, stopping at the transfer station, and that no express wagon crossed in front of the car as it approached G street. The conductor testified that after turning into Fifteenth street, the man who had come out of the grip car back into the coach came out on the rear platform and stood alongside of him; that he watched him closely until after the train passed F street, and, as the man said nothing about wanting to get off, he paid no further attention to him; that as the train neared G street his (the conductor's) attention was directed to the adjoining track, and when the train stopped at the transfer station he looked around, missed the man who had been standing alongside of him, and saw him standing up in the street, in front of the Riggs House, brushing his clothing. The transfer agent of the defendant testified that the regular stopping place for passengers on trains bound north on Fifteenth street was at the transfer station north of G street; and that passengers who got off in front of the Riggs House would not be entitled to transfers; though both he and the conductor proved that if a preceding train occupied the tracks at the transfer station on the north side of G street, the succeeding train coming up would stop in front of the Riggs House; and if a passenger got off while the train was so stopped, he would be entitled to a transfer; and further, that if the grip car and two trailers were stopping at the regular stopping place, the rear end of the coach would extend to the north building line of G street; that it does not frequently happen that trains stop below G street, because another train is at the regular stopping place; that this does happen when a forward car has been detained in some way; and that very often a wagon crosses the track and detains the cars.

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Upon the whole evidence, both parties asked instructions to the jury; and all the prayers propounded by the plaintiff and several of those on the part of the defendant were granted, while several of the prayers offered by the defendant were refused, and among the latter was one that asked the jury to be instructed that there was no evidence tending to prove negligence on the part of the defendant, as alleged, and, therefore, the plaintiff was not entitled to recover. The defendant excepted to the granting of the plaintiff's prayers, and to the refusal to grant those of the defendant which were rejected; and the defendant also excepted to certain parts of the general charge of the court to the jury.

The errors assigned by the appellant, on the exceptions taken, are reduced to three, to wit:

1st. That the court erred in refusing to instruct the jury that there was no proof of negligence on the part of the defendant to entitle the plaintiff to recover.

2d. In refusing to instruct the jury that, *as matter of law*, the conductor on the car was entitled to notice of the desire of the plaintiff to get off the car in front of the Riggs House, if that place was found not to be the regular stopping place for passengers to get off.

3d. In refusing to instruct the jury that the plaintiff's right to recover was limited to the allegations of his declaration.

*Mr. Enoch Totten, Mr. W. D. Davidge and Mr. J. S. Flannery* for the appellant.

*Mr. J. J. Darlington* for the appellee.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

1. As to the first of these supposed errors, we think there was no sufficient ground for the assignment. It was a fact made quite clear by the testimony for the plaintiff that the car came to a full stop on the south side of G street, opposite the Riggs House; and though but a short distance from the

transfer station on the north side of that street, and not at the usual place of stopping, there must have been some existing cause for the stop. It was testified to as a fact, and conceded by the defendant's prayer, that when the car did so stop, for any cause, opposite the Riggs House, passengers would get off and on the waiting train. This practice was, of course, known to the defendant, as it was proved by its own witnesses. It was the duty, therefore, of the employees on the train to keep a lookout and be on their guard in respect to passengers who might get off or on the train, when it had come to such stop before reaching the regular station. The plaintiff was observed by the conductor to get up from his seat in the car, and come to the rear platform, where the conductor was standing as the train approached G street. When the car drew up in front of the Riggs House, the plaintiff was standing beside the conductor, and ready to step down so soon as the car stopped. This was a fact tending to show knowledge on the part of the conductor, of the design and attempt of the plaintiff to get off the car; at least, it was a circumstance to be considered by the jury. Negligence is not required to be established by positive and direct evidence, but it may be inferred from circumstantial proof. And if the conductor was standing on the rear platform of the car when the plaintiff attempted to get off, or had knowledge of the attempt of the plaintiff to get off the car at that place, or had reasonable ground of belief that he intended or was in the act of getting off at that place before the car stopped, it was his duty to see to it that the plaintiff had reasonable time, with due diligence on his part, to get off in safety; that is to say, that there was no such negligence on the part of those in charge of the car as would tend to produce injury to the plaintiff while so getting off the car. It is a settled principle that if a passenger voluntarily alights from a street car in motion or when at a place or in a position where passengers are not *intended or expected to get off the car*, the passenger so getting off or on the car takes

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the risk of injury by the sudden starting up of the car, and the employees who so start the car are not negligent, *if they are ignorant that the passenger is so alighting from or getting on the car.* *Nichols v. Middlesex R. Co.*, 106 Mass. 463. But it is otherwise if such employees have knowledge, or reasonable ground to suppose, that the passenger is in the act of getting off the car at the time of so starting it up. If a street car stops to take on or let off passengers, or stops at a place where passengers may get off or on, though not a regular stopping place, those in charge of the car must wait a sufficient length of time to enable passengers attempting to get off or on, to alight or get on in safety, by the exercise of reasonable diligence; and must, in any event, see and know that no passenger is in the act of alighting, or is otherwise in position which would be rendered perilous by the motion of the car when again put in motion. If the employees fail in any of these respects and injuries result to the passengers from such failure, the company employer is liable. *Birmingham Union R. Co. v. Smith*, 90 Ala. 60; *Poulin v. Broadway R. Co.*, 61 N. Y. 620; *Nichols v. Sixth Avenue R. Co.*, 38 N. Y. 131; *Chicago City R. Co. v. Mumford*, 97 Ill. 560; *Werbowlisky v. Fort Wayne and Elmwood R. Co.*, 86 Mich. 236.

We are of opinion that the court below was entirely right in refusing to instruct the jury that there was no evidence of negligence on the part of the defendant to be considered by the jury. There was evidence on the part of the plaintiff, and a conflict of evidence produced by the evidence on the part of the defendant, and that made it necessary that the question should be submitted to the jury. The question of the conflict of evidence could only be decided by the jury. Whether the question on the facts preponderated the one way or the other, was not a question for the court to decide, but exclusively for the jury.

2d. With respect to the second assignment of error, we have already stated the facts in evidence, and the instruc-

tions thereon as matter of fact for the jury; and we think the court below was unquestionably right in refusing to instruct the jury, *as matter of law*, that if the plaintiff got off the car opposite the Riggs House without giving notice to the conductor of his intention to get off, or that the conductor was not aware of the fact of the plaintiff's getting off at that place, the plaintiff could not recover. Such an instruction, in view of all the evidence in the cause, would have been misleading. Actual or express notice was not required to be given to the conductor, assuming the evidence to be true; and the question was not so much as to whether the conductor did in fact know that the plaintiff was getting off the car, but, if he did not know, whether he ought to have known the fact, under the circumstances of the case. This question as matter of fact was fully submitted to the jury; and upon its determination was made to depend the liability or exoneration of the defendant. If the jury found, as we must suppose they did, under the instruction given them, that the conductor had notice, or reasonable ground to suppose, that the plaintiff was about getting off the car at the place where the accident occurred, he was bound to see that reasonable time was allowed to enable the plaintiff to get off safely. This, under the evidence, was purely a question of fact for the jury. The cases are but few where the court can undertake to decide upon the evidence, *as matter of law*, that there is such contributory negligence as will preclude the plaintiff from recovery. As a general principle, it is only where the circumstances of the case are such that the standard and measure of duty are fixed and defined by law, and are the same under all circumstances; or where the facts are undisputed, and but one reasonable inference can be drawn from them, that the court can interpose and declare, *as matter of law*, that there is such contributory negligence as will defeat the action of the plaintiff. As a general proposition, a question of negligence is a question of fact, and

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must be submitted to the jury; and that was very fully and fairly done in this case.

3d. The third and last assignment of error relates to the supposed variance between the allegations of the declaration and the proof; or, in other words, that the proof fails to support the allegations made in the declaration as to the place of stopping the car and the object of the plaintiff in getting off at that place. But we perceive no material variance; certainly none that could have misled the defendant, or operated to its surprise. The proof by the defendant's witnesses showed that it was a habit or custom of the defendant to stop its cars south of G street, opposite the Riggs House, whenever the regular stopping place at the station north of G street happened to be occupied by a preceding train, or for any cause the train could not get to the station. That the plaintiff got off the car on the south side of G street, to go to the place of his employment, and not to obtain a transfer to another car, as alleged, would seem to be wholly immaterial, and produced no such variance as could be prejudicial to the defendant.

Upon the whole evidence, the jury were very fully and fairly instructed, and the case was fully covered, and all the questions that could be fairly raised upon the evidence were presented and explained to the jury.

Finding no error, the judgment must be affirmed; and it is so ordered.

*Judgment Affirmed.*

## SIS v. BOARMAN.

EQUITY; MORTGAGES AND DEEDS OF TRUST, ENFORCEMENT OF; LIMITATIONS; LACHES; MERGER; NOTICE, RECORD OF DEED AS; INCHOATE RIGHT OF DOWER; PARTITION.

1. The enforcement in equity of mortgages and deeds of trust of real estate, is governed by the statute of limitations applicable to possessory actions at common law for the recovery of real estate, which statute in this District is that of 21 James I, Ch. 16, prescribing twenty years within which such actions must be instituted.
2. Because a deed of trust creditor has permitted nineteen years and five months of such term of twenty years to elapse without attempting to enforce his deed of trust, he will not for that reason alone be held guilty of laches, and to be barred from the prosecution of his suit to enforce. Some special ground must be shown to justify the application of the doctrine if laches in cases to which the statute of limitations is directly applicable.
3. The fact that an indebtedness is contracted for the purchase and consumption of intoxicating liquors, does not, in this District, constitute ground for a court of equity to refuse its aid in enforcing it.
4. Where a debtor gives a deed of trust to secure the payment of a bond executed to his creditor, and the bond is subsequently reduced to judgment, the bond is not so merged in the judgment as to preclude the creditor from enforcing the deed of trust in equity.
5. The omission of the words "before me" by the recorder of deeds in his transcription of a certificate of acknowledgment attached to a deed, reading that the grantor "personally appeared before me on the day and date hereof," does not make the record of the deed ineffectual to give constructive notice to third persons of the transfer; and if the transcript be subsequently corrected by the recorder, the record is admissible in evidence.
- X 6. An inchoate right of dower in a wife can not be broader than the estate of her husband upon which it depends.
7. Neither the beneficiary nor the trustee under a deed of trust can maintain a bill for partition of the property covered by the deed of trust; but the purchaser at a sale thereunder may do so.

No. 670. Submitted April 26, 1897. Decided May 25, 1897.

HEARING on an appeal by the complainant from a decree

D. C.]

Statement of the Case.

dismissing a bill of complaint in a suit for the foreclosure of a deed of trust and for partition. *Reversed.*

The Court in its opinion stated the case as follows :

On December 29, 1875, John H. Boarman, one of the appellees, being indebted to the appellant, John H. Sis, in the sum of \$158.88, executed and delivered to him his bond, or instrument of writing under seal, whereby he acknowledged the said indebtedness and obligated himself, his executors, administrators and assigns, to pay the same, with interest, in one year thereafter. At the same time, to secure the payment of said bond, the said appellee, John H. Boarman, executed and delivered to the appellant a deed of trust by way of mortgage, whereby he conveyed to one Richard R. Crawford, now deceased, as trustee, the undivided share of him, the said grantor, in the estate, both real and personal, of his deceased father, Charles L. Boarman, after the decease of the grantor's mother, Mary Boarman, the widow of said Charles L. Boarman, to whom by the last will and testament of the latter a life estate had been given in all his property, with remainder over to the children of the testator in fee simple. The interest of John H. Boarman conveyed by this deed of trust seems to have been one-fifth undivided part of his father's estate, subject to the life estate of the testator's widow, which did not end until her death in February, 1896, after the institution of the present proceedings. It seems that whatever personal estate had been left by Charles L. Boarman was in some way consumed,—at all events, that none of it had come in any way to the satisfaction of the appellant's claim ; and that the only real estate of which Charles L. Boarman died seized and possessed was a piece of land on Fifth street in the former town of Georgetown, twenty feet front by one hundred and fifty feet in depth, with a building on it, which was and continued to be the family residence. It was upon his undivided interest in the property that John H. Boarman's deed of trust to

Richard R. Crawford, as trustee, took effect; and the present proceedings have been instituted in order to enforce the deed of trust against the undivided interest.

Under date of May 10, 1883, or afterwards, all the heirs and devisees of Charles L. Boarman, other than Richard T. Boarman, one of his sons, and including, it seems the widow and life tenant, Mary Boarman, conveyed to said Richard T. Boarman all their right, title and interest in the real estate mentioned. The conveyance of his interest by John H. Boarman to Richard T. Boarman seems to have been without any reference to the deed of trust thereon previously given to secure the appellant; and Richard T. Boarman has testified in the present cause that, at the time of the conveyance of said interest to him, he had no knowledge of said deed of trust, and had caused no examination to be made of the land records of the District of Columbia, where the deed had been recorded immediately after its execution, and where upon such examination it would necessarily have been found.

On December 28, 1888, which was one day before the statute of limitations would have apparently barred a suit at common law upon the bond given to the appellant by John H. Boarman, the appellant instituted proceedings at common law in the Supreme Court of the District of Columbia, upon the bond; and although the suit seems to have been permitted to slumber for some years, the appellant procured to have judgment rendered therein in his favor on June 6, 1895, for the amount of the indebtedness mentioned in the bond, the sum of \$158.88, with interest from December 29, 1875, and the costs of the suit. John H. Boarman permitted the judgment to go against him by default. A writ of *feri facias* was issued upon it, and was returned unsatisfied.

Thereupon on August 27, 1895, the present suit in equity was instituted for the purpose of the enforcement of the deed of trust, recourse to equity having been necessitated by the

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death of the trustee, Richard R. Crawford, and the absence from the District of Columbia of one of his heirs, with his place of residence unknown, if the heirs could have executed the trust.

The original bill, which was filed against John H. Boarman, Richard T. Boarman, Laura J. Crawford, and William L. Crawford, was found to be defective; and upon the interposition and allowance of a demurrer to it, an amended bill was filed on March 16, 1896, wherein the original bill was recited and incorporated, and its prayers reiterated, and an additional prayer was inserted to the effect that, as the whole property in the hands of Richard T. Boarman was incapable of subdivision, the whole should be sold, and not merely the undivided interest that had been conveyed by John H. Boarman. In this amended bill the death of the life tenant, which had occurred a short time before, was set up.

Answers were filed to this amended bill by Richard T. Boarman and John H. Boarman. The record before us does not show what proceedings were had against the Crawfords; but presumably the proper steps were taken to divest them of the legal title that had been vested in them by the deed of trust.

In the answer of Richard T. Boarman it was suggested that his wife, Lizzie Boarman, had and claimed to have a dower interest in the land in question, and that she had not consented to any sale of it, and had not been made a party to the suit. Thereupon the complainant filed on May 23, 1896, a second amended bill, making Lizzie Boarman a party to the suit; and she answered in due time, alleging that she had a dower interest in the property and that she declined to consent to any sale.

The answers called for proof of the complainant's claim, which was abundantly furnished in the testimony, the defendant, John H. Boarman, himself fully admitting it. The burden of the defense set up was mainly the technical one

of the statute of limitations and laches in the prosecution of the claim.

Upon this last mentioned ground, it is understood, the court below dismissed all the bills of complaint. From the decree of dismissal the complainant has appealed to this court.

*Mr. Wm. J. Miller* for the appellant:

1. Chancery follows the law in obedience to the statute of limitations in relation to the same subject matter. *Watkins v. Harwood*, 2 G. & J. 307. A deed of trust of real estate to secure the payment of money is in effect a mortgage, and the period of limitations applicable to it is twenty years. *Shellabar v. Robinson*, 97 U. S. 68. The remedy thereon will not be barred by any lapse of time short of the period sufficient to raise the presumption of payment. *Smith v. Railroad Co.*, 33 Gratt. 620; *Grant v. Burr*, 54 Cal. 298; *Lockwood v. White*, 26 Atl. Rep. 639; *Cranford v. Severson*, 5 Gill, 448; *Railroad Co. v. Trimble*, 51 Md. 101; *Hughes v. Edwards*, 9 Wheat. 497; *Elmendorf v. Taylor*, 10 Wheat. 152.

2. When a mortgage and a bond are given to secure the payment of the same debt the creditor may sue on all his remedies at the same time. He may file a bill in equity, bring ejectment, and also an auction upon the bond or note. *Lingan v. Hardeston*, 1 Bland's Ch. 281; *Moreton v. Harrison*, 1 Bland, 499; *Ober v. Gallagher*, 93 U. S. 199. The judgment on the note or bond does not extinguish the right to have execution of the deed of trust. *Bank v. Guttschlick*, 14 Pet. 19.

3. The statute of limitations, as to the deed of trust, did not begin to run in this case until the death of the life tenant on February 13, 1896. *Doe de Curzon v. Edwards*, 6 M. & W. 301.

4. The omission of the words "before me" in the record of the certificate of acknowledgment did not invalidate the deed or the record thereof. *Black v. Aman*, 6 Mack. 156;

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*Van Ness v. Bank*, 13 Pet. 21; *Deery v. Cray*, 5 Wall. 797; *Kelly v. Calhoun*, 95 U. S. 710; *Carpenter v. Dexter*, 8 Wall. 519. The record thereof is notice to all the world. R. S. D. C., Sec. 447; *Hughes v. Edwards*, 9 Wheat. 499.

*Mr. J. J. Waters* for the appellees:

1. The statute of limitations runs from the date of the mortgage, and not from the maturity of the bond alleged to be secured by it. The trust could have been enforced in one year, and hence not only the presumption of payment from the lapse of time, but gross laches bar the relief sought by the appellant. *Kirk v. Parkhill*, 1 MacA. 28; *Rider v. White*, 3 Mack. 305; *Abraham v. Ordway*, 158 U. S. 416; *Cropley v. Eyster*, 9 App. D. C. 373; *Townsend v. Vanderwerker*, 160 U. S. 171; *Willard v. Wood*, 164 U. S. 502.

2. The amended bill was for a new cause of action, and the same considerations apply. *Railroad Co. v. Weyler*, 158 U. S. 285.

3. The appellant, being only a lien holder has no right to partition. 17 Am. & Eng. Encyc. Law, 694 *et seq.*

4. The defective record of the deed did not operate as notice. *Lynch v. Murphy*, 161 U. S. 247; *Elliott v. Piersall*, 1 Pet. 328; *Lyon v. Alley*, 130 U. S. 177; 19 Am. & Eng. Encyc. Law, 458, 459.

Mr. Justice MORRIS delivered the opinion of the Court:

1. It is well settled law that, wherever they are applicable, statutes of limitations are of equal binding force in equity as at common law. *Elmendorf v. Taylor*, 10 Wheat. 152; *Lewis v. Marshall*, 5 Pet. 470; *Bank of United States v. Daniel*, 12 Pet. 32; *Miller v. McIntyre*, 6 Pet. 61; *Moore v. Greene*, 19 How. 69; *Godden v. Kimmell*, 99 U. S. 201; *Ware v. Galveston Co.*, 111 U. S. 170; *Meath v. Phillips Co.*, 108 U. S. 553; *Norris v. Haggin*, 136 U. S. 386; *Willard v. Wood*, 1 App. D. C. 44. It is equally well settled that the enforcement in equity of mortgages of real estate, and of deeds of trust of

real estate given by way of mortgage, is governed by the statute of limitations applicable to possessory actions at common law for the recovery of real estate, which statute in this jurisdiction is that of 21 James I, Ch. 16, prescribing a period of twenty years within which such action must be instituted. Story's Equity Jurisprudence, Secs. 529, 1028a, 1520, and cases cited. It is likewise well settled, and so far settled as that it must be regarded as elementary law, that in all cases the period of limitations begins to run only from the time when a cause of action accrues, and not from the time when a liability is incurred or an obligation is executed. Wood on Limitations of Actions, Sec. 117.

From these elementary propositions of law it is entirely plain that the enforcement of the deed of trust in the present case was not barred by the statute of limitations, either at the time of the institution of the suit, or at the time of the filing of the amended bills, or either of them, or for several months after the filing of the last amended bill. The bond secured by the deed of trust did not mature until December 29, 1876; and the complainant had not until then a cause of action; and only from that date did the period of limitations of twenty years begin to run.

2. But it is argued that, although the statute of limitations may not have barred the suit, there was laches on the part of the complainant such as to preclude him in equity from maintaining the suit.

There is no room here for the application of the doctrine of laches. It would be absurd to hold that, if a person has a term of twenty years under the statute within which to bring his action, he is to be regarded as guilty of laches unless he brings it within some shorter period. Nineteen years and five months are not the equivalent of twenty years either at common law or in equity.

While the doctrine of laches and the principle on which statutes of limitations are based are grounded upon the same requirement of public policy, that stale demands

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should not be advanced, when possibly the evidence of the original transaction has by the lapse of time been lost, or the memory of witnesses has for the same reason become impaired, or the conditions of the parties have been so materially changed that the same exact justice can not now be done to them, yet in their application the two things are quite different. As was said by the Supreme Court of the United States in the case of *Gallihier v. Cadwell*, 145 U. S. 368, "laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced, an inequity founded upon some change in the condition or relation of the property of the parties." Again, in the case of *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, the same court said: "Courts of equity in cases of concurrent jurisdiction consider themselves bound by the statutes of limitations which govern actions at law. In many other cases they act upon the analogy of cases at law. But even when there is no such statute governing a case, a defence founded upon the lapse of time and the staleness of the claim is available in equity."

In the case of *Willard v. Wood*, 1 App. D. C. 44, 58, it was said by this court: "The principle is too well established to admit of controversy, that the statute of limitations is no less a bar to relief in equity than it is to a recovery at common law. It is true, in matters of mere equitable rights or titles, courts of equity apply the statute simply by way of analogy to its application at law to legal titles of the same nature."

In the case of *Cholmondeley v. Clinton*, 2 Jac. & Walk. 141, it was said by Sir Thomas Plumer, Vice Chancellor: "Whenever a bar has been fixed by statutes to the legal remedy in a court of law, the remedy in a court of equity in the analogous cases has been confined to the same period."

From these and numerous other cases that might be cited, it is quite plain that it is only in the matter of the enforcement of purely equitable rights that the doctrine of laches

applies, and that it has no place in the matter of the enforcement of those rights for which the statute law expressly provides a limitation. We do not desire to be understood as holding or intimating that in no case whatever in which the statute of limitations is directly applicable there may not be superadded reasons for the application of the doctrine of laches so as practically to reduce the period of limitations in the particular case. What we do hold is, that upon the ground of lapse of time alone, there is no room for the joint application of the statute of limitations and the doctrine of laches where they would conflict with each other, and the equitable doctrine would have the effect of reducing the statutory period of limitations. If there are exceptional cases where it would be proper to apply the doctrine, no such case is here presented. No exceptional circumstance of any kind is adduced as a basis for such application. The contention is simply that because the complainant has permitted nineteen years and five months to elapse of the term of twenty years, to which by the statute and by the invariable current of decision in all such cases in equity he is entitled, he is for that reason alone to be held guilty of laches, and to be barred from the prosecution of his suit. We find no warrant for that contention; nor do we find any different doctrine stated in the case of *Abraham v. Ordway*, 158 U. S. 416, or in the case of *McKnight v. Taylor*, 1 How. 161, or in any of the other cases cited on behalf of the appellees.

The case of *McKnight v. Taylor*, upon which, it seems, principal reliance is placed, was determined by its own peculiar facts. There a deed of trust had been made to secure a number of creditors. It provided that, if the grantor in the deed should not by a day therein named, a little upwards of four years thereafter, pay the several creditors thereby secured their several claims, then the trustee, on the demand of any of the said creditors, should proceed to sell the property and discharge the debts. Nearly twenty-four years after the date of the execution of the deed, and about

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nineteen years and eleven months after the day specified in the deed at which the creditors might call upon the trustee to sell, the latter (the trustee) filed a bill in equity, alleging as his reason for recourse to a court of equity that there was a previous outstanding mortgage or deed of trust upon the premises, unreleased upon the record, but actually satisfied, and alleging also that the maker of the deed claimed that the debts had all been paid, and threatened to withhold possession of the property in the event of sale, thereby obstructing the execution of the deed. It was further alleged in the bill that the sale had been demanded by an alleged creditor, who was the assignee of an assignee of one of the original creditors, and by certain other creditors not named in the bill. But it appeared in the sequel that no other creditor than this assignee who was named had requested the enforcement of the trust, and that this creditor had not proved his claim, and took his assignment at a time when he knew that the claim was in litigation, and thereafter slept upon his rights, if any he had, until the circumstances had been entirely changed. And various circumstances showing the change of conditions and the inequitable character of the proceeding are recited in the report of the case.

In this case, it will be noticed, the embarrassed debtor, who had executed the deed of trust, had reserved the right to himself to settle with the creditors; and yet for nearly twenty-four years thereafter the alleged creditor in the case, so far as the record shows, had done absolutely nothing to effect a settlement, and gave no reason whatever for his delay in seeking a settlement, and so far as we know, his claim may have been barred long before the time when the deed of trust became operative. The deed of trust, under the circumstances, could not have had the effect of keeping it alive for an indefinite period.

Clearly this case is no authority for the position assumed by the appellees in the case now before us, which simply is that mere lapse of time, even within the period of limita-

tions, is to be regarded in equity as laches. And this is made even more clear by the case of *Bowman v. Wathen*, 1 How. 189, decided by the Supreme Court of the United States at the same term at which the case of *McKnight v. Taylor* was decided, and very soon after that case. In the case of *Bowman v. Wathen*, the court, discussing the rule laid down by Lord Camden in the case of *Smith v. Clay*, 3 Brown's Ch. Rep., and by Lord Redesdale in the case of *Hovenden v. Lord Annesley*, 2 Scholes & Lefray, 636, distinctly recognized the statute of limitations as applicable in such cases, and applied the doctrine of laches only when it was sought, upon the theory that the statute of limitations does not run against a trust, to enforce such a trust long after the lapse of the period of limitations.

The doctrine of laches, as we have intimated, may be applied in exceptional cases even within the period of limitations; but there must be some special ground shown for its application, and mere lapse of time alone, in cases to which the statute is directly applicable, is not such ground. There is here no conflict of evidence, no claim of loss of evidence from the lapse of time or the failure of the memory of witnesses, no change of condition or of circumstances, that would render inequitable the enforcement of the contract between the original parties. The bond, the deed of trust, and the indebtedness which both were intended to secure, have been amply proved, and have in fact been admitted by the obligor, John H. Boarman. Moreover, the bond itself has been reduced to judgment, it being thus shown conclusively that it has never been paid or satisfied. No circumstances whatever are shown to warrant the application here of the doctrine of laches, so as to shorten the period of limitations prescribed by law for the enforcement of mortgages and deeds of trust of real estate.

In this connection, and with reference also to other questions in the case, reference is made to the alleged character of the purpose for which the indebtedness of the appellee,

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John H. Boarman, was originally contracted—the purchase and consumption, as it is claimed, of intoxicating liquors. But there is no sufficient proof that this was the foundation of the indebtedness; and even if there were such proof, it is not apparent how, under the laws of the District of Columbia, this should constitute a ground for a court of equity to refuse its aid to enforce a valid contract.

3. The objection of the appellees, that the bond given by John H. Boarman became merged in the judgment obtained upon it by the appellant, and that the appellant was thereafter precluded from proceeding to enforce the deed of trust in a court of equity, requires no consideration from us. The rule that a person, having a security for a legal claim, may proceed concurrently at common law and in equity, at common law to enforce the claim directly and in equity to render the security available towards its satisfaction, is too well settled as an elementary principle in equity to require the citation of authorities upon the subject.

4. It is claimed, in the next place, that the appellee, Richard T. Boarman, is an innocent purchaser for value of the interest of his brother, John H. Boarman, in their father's property; that it appears from the evidence that he had no actual knowledge at the time of his purchase that his brother John had given the deed of trust, here in controversy, and that the record of this deed was not constructive notice to him, in consequence of the omission of certain words from the transcript upon the land records of the District of Columbia, of the certificate of acknowledgment affixed to the deed.

Assuming it to be true, although it would seem to be contrary to the inherent probabilities of the case, that Richard T. Boarman had no actual knowledge of the fact that his brother had given this deed of trust, yet undoubtedly he is to be charged with constructive notice of the deed from the records, if the transcript upon the records was in due form. The contention is that it was not in due form.

The original deed was produced in evidence in the case. It showed no defect whatever, either in the deed itself or in the notary's certificate of acknowledgment attached thereto. That certificate purported to read as follows: "John H. Boarman . . . personally appeared before me on the day of the date hereof . . ." In the transcript of this certificate in the land records, which was also offered in evidence, the two words, "*before me*" were omitted, plainly as the result of a clerical error, so that the record read thus: "John H. Boarman . . . personally appeared on the day of the date hereof . . ." During the course of the evidence, the attention of the Recorder of Deeds was called to the matter, and that officer upon the exhibition of the original document to him, voluntarily interlined upon the record the omitted words; and the record thus corrected was then also offered in evidence. It is now argued that in consequence of the omission of these two words from the record as it stood at the time of the purchase by Richard T. Boarman from his brother, John H. Boarman, that record was ineffectual to give constructive notice.

We find no merit in the argument. The defect in the record is plainly not a substantial defect in any reasonable view that can be taken of it. It was not the omission of any substantial statement of fact. It left no doubt as to the meaning of the transaction, and it could not by any possibility have misled anyone.

The provisions of the statute law for the record of deeds and conveyances of land must be taken in a liberal and reasonable sense to effectuate the beneficial purposes which they are intended to subserve. This record system, so universal with us, although practically unknown to the common law, is not in derogation of the common law or of common right, but a most valuable adjunct to it; and there is no reason why its great utility, which is now universally recognized and acted upon in every part of our Union, should be sought to be impaired by unduly magnifying

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mere clerical errors of transcription, which are recognized at once to be only clerical errors due to the inadvertence of some copyist, and which involve no statement of fact that is important to be known. If there is an independent substantial fact to be stated, and such fact is omitted, then undoubtedly the omission is serious; but there is no such omission in the casual exclusion from an entirely good statement of fact of words the effect of which would be only to make the statement more explicit.

But there is another and conclusive answer to the contention of the appellees in this regard. The statute in force in the District of Columbia at the time of the execution of the deed in question, and which is yet in force with some modification not important in this connection, provided that all deeds, except deeds of trust and mortgages, which should be acknowledged and certified according to law and delivered for record within six months after the execution thereof, should be valid against all persons from the time of the acknowledgment, and that deeds of trust and mortgages, so acknowledged, certified, and delivered for record, should take effect against all persons from the time of their delivery for record. Revised Statutes of the United States for the District of Columbia, Sections 446, 447. The deed of trust in the present case was duly acknowledged and certified according to law, and was duly delivered for record. By force of the statute it took effect from the time of its delivery for record. From that time it was notice to everyone; and the transcript of it upon the record became notice as soon as it was transcribed. It is the deed itself, and to the transcript thereof, and not to the certificate of acknowledgment, that the statute gives this force and efficacy. It is true that, under the statute, the transcript of a deed is not notice unless there was affixed to the original deed a proper certificate of acknowledgment; but if there was such a certificate affixed to the original deed, whether the certificate itself has been correctly tran-

scribed on the recorder's books or not, or even if the recorder has wholly failed to transcribe the certificate, the statute at once, upon the delivery of the deed to the recorder for record, gives to it the force of notice to all the world.

Of course, a defective transcript of a certificate of acknowledgment, or a correct transcript of a defective certificate, will not authorize the accompanying transcript of a deed to be read in evidence, or even to avail as notice to subsequent purchasers. What the statute purports to effect is, that if the original deed has affixed to it a proper certificate, and such fact appears in due course of proceedings, the record is then available as evidence, and is notice to all persons dealing with the property purporting to be conveyed by it. If they assume that an apparently defective transcript of the certificate correctly represents the original, they must take the risk of error in the transcription. The defect, at best, is no more than a technical one, which may not be sustained by the actual facts and the original documents when produced.

The appellee, Richard T. Boarman, testifies that he did not examine the land records at all, or cause any examination of them to be made, at the time of his purchase from his brother. But if he failed to take the ordinary precautions usual in such cases, he must be charged with the consequences of his risk. He had the opportunity for investigation; and we must hold him chargeable with notice of the existing deed of trust at the time at which he purchased from his brother, and to have purchased the property subject to that deed.

5. What we have just said in reference to the efficacy of the deed of trust given by John H. Boarman as superior to the title subsequently conveyed by him to his brother, Richard T. Boarman, must dispose of the dower interest claimed by Mrs. Lizzie Boarman, the wife of the latter, so far as concerns the interest conveyed by John H. Boarman. The inchoate dower interest of the wife, if it existed at all in the

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case, could not be broader than the estate of the husband upon which it depends. In the property covered by the deed of trust it must be held to be subordinate to the rights of the appellant under that deed.

6. The appellant is not entitled to have any partition, as prayed for by him in his amended bills. Partition, or sale for the purpose of partition, is allowed only to him who has an estate in the property sought to be partitioned or sold. A mortgagee out of possession and before foreclosure has no such estate in him; his interest in that regard is no more than a lien. Story's Eq. Jur., Vol. 1, Secs. 646, 650, and notes; *Norcross v. Norcross*, 105 Mass. 265; *Brownell v. Brownell*, 19 Wend. 267. No one is entitled to maintain partition who has not an estate that entitles him to immediate possession.

Much less is the beneficiary under a deed of trust entitled to have partition; for he has no estate whatever, and no possibility even of a right of possession. Nor has the trustee in the deed any such right, for his trust is specifically limited to a right of sale upon a certain specified contingency.

The appellant is entitled to have his deed of trust enforced against the interest in the real estate specified which was conveyed by John H. Boarman to Richard R. Crawford. If that interest should be sold, the purchaser may maintain a suit for partition; for that purchaser will have acquired an estate that will entitle him to partition, or to a sale for the purpose of partition. But until a sale is had and an indefeasible estate acquired, there is no right of partition.

From what we have said, it results that, in our opinion, the appellant is entitled to a decree in his favor for the sale of the interest conveyed by the deed of trust of John H. Boarman; and that, therefore, the decree of the Supreme Court of the District of Columbia, dismissing the appellant's bill of complaint, and from which the present appeal has been prosecuted, should be *reversed, with costs*. *The cause will accordingly be remanded to that court, with directions to vacate*

*its decree in the premises, and to enter a decree therein in accordance with this opinion; and for such further proceedings according to law as may be just and proper. And it is so ordered.*

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ROBINSON vs. PARKER.

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PLEADING AND PRACTICE; TRIAL; JUDICIAL DISCRETION; EVIDENCE; PARTNERSHIP.

1. The common law practice requiring that the plaintiff shall offer the whole of his evidence in support of the issue which he maintains; that the defendant shall then offer evidence to maintain his entire case, and that the plaintiff is then limited in reply to new matter only that has been raised in the defence, prevails in this District.
2. The discretion of trial courts in the application of rules of trial practice, is so large that its exercise will rarely be reviewed on appeal.
3. In a suit on a promissory note by several plaintiffs suing as co-partners, in which the issue is as to the existence of the partnership, the sworn statements of the plaintiffs in other suits denying the existence of the partnership, offered by the defendant after the plaintiffs have closed their case, constitute new matter which the plaintiffs are entitled to rebut.
4. If two or more persons, without a special or express agreement to form a partnership, contribute to a fund to be invested as occasion offers, in notes, stocks and the like, and agree to share the gains and losses thereof, they thereby become partners.
5. A prayer for instruction that if the jury should find the facts which they were instructed would constitute a partnership, "then they are instructed that such relationship could not be affected by subsequent declarations by any one or all of the parties concerned," is erroneous, as tending to exclude from the consideration of the jury the effect of such declarations upon the question of whether such facts actually existed.
6. A trial court is not required to amend or modify a prayer presented in an objectionable form, and its refusal is therefore not reversible error.

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7. A special plea denying the existence of a partnership alleged by the declaration to have existed between the plaintiffs (under Rule 112 of the Supreme Court of this District, providing that the special character in which the plaintiff sues shall not be considered in issue or necessary to be proved, unless by special plea under oath as to the truth thereof, the same be denied), is not a technical plea in abatement, but a special plea of denial consistent with the ordinary pleas in bar provided for by the rules of that court and cognizable with them.

No. 659. Submitted April 27, 1897. Decided May 25, 1897.

HEARING on an appeal by the plaintiffs from a judgment on verdict in an action on a promissory note. *Reversed.*

The COURT in its opinion stated the case as follows:

The appellants, Bushrod Robinson, William L. Chery and Eugene F. Robinson, as plaintiffs, brought this suit in the Supreme Court of the District of Columbia May 12, 1896, upon a note made by the defendant, Henry B. Parker, July 15, 1892, and payable to the order of Robinson, Chery and Robinson. They alleged that they were partners under that name and style. The only plea of the defendant was a denial of the partnership verified as required by the rules of court. In order to prove the partnership, as alleged, Eugene F. Robinson, one of the plaintiffs, testified substantially: That plaintiffs had become partners on or before July 15, 1892, by an oral agreement, in the business of lending money, buying notes, real estate, and so forth; and that each contributed an equal share and was to share equally in the profits and losses. On cross-examination he was shown an answer filed by him and his coplaintiffs to a bill filed against them by said Parker on July 1, 1893, in cause No. 14,682, in equity, in the Supreme Court of the District of Columbia, and identified the signatures thereto, and said that he made oath to it.

Having read the answer, he was asked: "Did you not, in answer to the bill in this cause, say under oath that there was no partnership existing between your father, yourself,

and Mr. Chery—that you were simply joint owners of some money, and that this note was given for a loan of that money of which you were joint owners, and that there was no copartnership between you?” He answered: “I believe I did; yes, sir.” He also said that he remembered joining in a bill with his father and Chery filed against said Parker and others in equity cause No. 14,877, in the Supreme Court of the District of Columbia, and identified his signature thereto. He was then asked: “Now that you have refreshed your recollection by reading the bill in the suit to which I refer, did you not in that suit swear that you were not partners, but that you were simply joint owners of a fund in bank?” He answered: “Yes.”

He then stated that the two proceedings to which his attention had been called related to the note in controversy in this suit. He was then asked by plaintiffs’ counsel to explain the circumstances under which he signed the answer in the equity cause, and said in reply that he had stated the case to his attorney, who drew the papers and witness signed them. He further said that, “as for the copartnership being a copartnership or partners, I left that to him as a law term; I did not know the difference between them.” Plaintiffs rested their case, and defendant then offered in evidence the answer in equity cause No. 14,682, and the affidavit of the parties thereto, and read to the jury the eighteenth paragraph thereof, which contained the allegation that “the defendants, without being copartners in any business or undertaking, were the joint owners of a certain fund on deposit in the Ohio National Bank, which fund the defendants kept on deposit in their joint names, under the designation Robinson, Chery and Robinson.”

The remainder of the paragraph alleged that in June and July, 1892, Bushrod Robinson and William L. Chery were associated in business with said Parker in selling clothing in Washington, and then proceeded to state that said Parker, desiring to improve certain property, said Robinson, Chery

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and Robinson advanced the money from time to time as the bills came in, out of said fund, and took the note (which is the same in controversy here), payable to said Robinson, Chery and Robinson, and denied that the note was taken by or belonged to the said Bushrod Robinson alone, as was alleged in the bill. Defendant then read in evidence the third paragraph of the bill No. 14,877, filed by these plaintiffs against said Parker, July 11, 1893, as follows: "In the months of June and July, 1892, the complainants were the joint owners of a certain fund on deposit in the Ohio National Bank of Washington, which fund the complainants kept on deposit in their joint names, under the designation 'Robinson, Chery and Robinson.'"

Defendant having closed with the foregoing, the plaintiffs offered to introduce Bushrod Robinson and William L. Chery, and prove by them the circumstances under which said allegations had been made. The witnesses were not allowed to testify on the objection made that the evidence was not admissible in rebuttal. Plaintiffs took an exception, and the evidence was closed.

The court gave the following special instruction asked by the plaintiffs:

"1. If the jury find from the evidence that the plaintiffs created a common fund by mutual contributions, with a verbal agreement that the same should be used in the business of purchasing stocks and notes and making loans, under the firm name of Robinson, Chery and Robinson; that it was agreed among them that they should share equally among them the profits and contribute equally to the losses, and that each had authority to manage the business on behalf of the others, then they are instructed that in contemplation of law the relation between the plaintiffs was that of partners, and their verdict should be for the plaintiffs."

Plaintiffs then asked the following special instruction, and excepted to its refusal:

"2. If the jury find from the evidence the facts which

they have been instructed by the first prayer constitute a partnership, then they are instructed that such relationship could not be affected by subsequent declarations by any one or all of the parties concerned, and their verdict should be for the plaintiffs."

The jury found for the defendant, and from the judgment rendered thereon plaintiffs have appealed, assigning two errors, founded on the exceptions taken as above stated.

*Mr. John Ridout, Mr. Henry C. Stewart, Jr., and Mr. Mason N. Richardson* for the appellants:

1. The denial of the offer of proof in rebuttal was more than the refusal to grant a privilege. It was a question which involved more than the ordinary direction of the order of proof, and was the denial of a substantial right, and was therefore error. *Meacham v. Moore*, 59 Miss. 561; *Meyer v. Cullen*, 54 N. Y. 392; *Jones v. Smith*, 64 N. Y. 180; *Vanblaricum v. Ward*, 1 Blackford, 49; *Higginbotham v. Chamberlayne*, 4 Munford, 547.

2. Whether or not the necessary elements exist to constitute a partnership is a question of fact for the jury, and as to whether such facts when proved to exist are sufficient to create a copartnership, is a question of law for the court. A partnership may therefore exist even though the parties themselves may not know or do not believe that they are partners, or have not even considered what that relation may be. In this case the necessary elements to constitute a partnership are proven to have existed from the inception of the relations assumed between them. Their declaration then or the declaration of any one or all of them subsequent to the formation of such relation and subsequent to the advancement of the money for which the note sued on was given, was immaterial, and should have been excluded from the consideration of the jury, or at all events the jury should have been instructed in reference thereto in accordance with the plaintiff's second prayer for instructions, and the refusal

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of this prayer was therefore error. *Berthold et al. v. Goldsmith*, 24 Howard, 536; *Everitt v. Chapman*, 6 Conn. 347; *Cumpston v. McNair*, 1 Wend. 457.

*Mr. W. L. Cole* and *Mr. Wm. G. Johnson* for the appellee:

1. At common law, of course, the question of partnership *vel non* would have arisen under the general issue, but by the rule of the court below it became matter of abatement and not in bar. *Cooper v. Coates*, 21 Wall. 105, 110. For this reason the defendant was precluded from interposing any defence in bar, as that could not be united with the plea in abatement.

2. The plaintiffs were really estopped from asserting any partnership between them in this case as to this note transaction because, in two previous proceedings between the same parties with respect to the same subject matter, they had declared that there was no partnership between them. Where a party takes a position in one litigation with respect to a matter he is not at liberty in a subsequent litigation with the same party to change his ground and adopt the contrary position. To permit this would be to permit a fraud, not only upon the party but upon the court, and has been twice ruled by the Supreme Court of the United States to be inadmissible. *Railroad v. Howard*, 13 How. 336, 337; *Railroad Co. v. McCarthy*, 96 U. S. 267, 268.

The court, therefore, would have been justified in instructing the jury to return a verdict for the defendant.

The proof of the partnership rested upon the unsupported statement of one of these plaintiffs, which, it must be conceded by appellants, could not have been strengthened by any evidence in rebuttal, as they were unquestionably bound to exhaust all their proof of partnership in their testimony in chief. There was therefore no preponderance in their favor, but the preponderance was the other way, and if a verdict had been rendered in their favor the court, unquestionably, would have been bound to set it aside. It is well

settled that where the court can see that no other verdict than the one rendered could, in any view of the case, have been sustained, it will not reverse the judgment. *Lancaster v. Collins*, 115 U. S. 227; *Bank v. Bank*, 21 Wall. 301.

Mr. Justice SHEPARD delivered the opinion of the Court:

1. In order to prevent injurious surprises and annoying delays in the administration of justice, rules of practice, looking to the orderly introduction of evidence by the respective parties, are essential. The trial has its regular stages of process, and the evidence should be introduced with direct reference thereto. In many, if not a majority, of the States of the Union, the strictness of the common law practice in respect of the introduction of evidence in chief and in rebuttal has been much relaxed; and the plaintiff is only required to open his case fairly upon all his points with a reasonable number of witnesses. Having thereby made a *prima facie* case, he may reserve additional testimony to strengthen his case upon such points as may be seriously attacked by his adversary. On the other hand, the established practice of the common law that has prevailed in this District requires that the plaintiff shall offer the whole of his evidence in support of the issues which he maintains; the defendant shall then offer evidence in maintenance of his entire case; and the plaintiff is limited in reply to such new questions as shall have been first opened by the defendant. *Bannon v. Warfield*, 42 Md. 22, 39.

The purpose of all rules of practice is the facilitation of the enforcement of justice; and hence, when their strict application would tend to its obstruction, the trial courts, under the wide discretion entrusted to them in such matters, may and should make departures to meet the exigencies of particular cases. This discretion is so large and its exercise is so dependent upon circumstances and conditions that can rarely be fully appreciated outside of the trial court itself, that as a general, if not universal, rule it will be re-

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garded as not subject to review in an appellate tribunal. *P. & T. R. Co. v. Stimpson*, 14 Pet. 448, 463; *Langdon v. Evans*, 3 Mackey, 6, 7. Therefore, if the foregoing rule applies with proper force to the facts presented on the bill of exceptions, there would be an end of the question. We are of the opinion, however, that it does not. Those facts come nearer falling within the rule of a class of cases where, as stated by Chief Justice Shaw: "It sometimes occurs that the evidence on re-examination would have been pertinent as original evidence in part, and in part is strictly rebutting." *Chadbourn v. Franklin*, 5 Gray, 312, 314. They make a case, indeed, much stronger than that stated.

The witnesses could have been called in the opening to testify to the existence of the denied partnership, in corroboration of their co-plaintiff, Eugene F. Robinson, and had that been the purpose of their call, after defendant had closed, their exclusion would not be error. So, likewise, had they been called merely to corroborate Eugene F. Robinson in the matter of his explanation of his own previous statements under oath, although his evidence was called out by the new matter offered in connection with his cross-examination by the defendant. Had the defendant contented himself with identifying the affidavit of Eugene F. Robinson, and then had introduced it in the course of his own case, that witness could properly have been introduced in rebuttal for the purpose of explaining the circumstances under which that admission or declaration had been made. But as it was called to his attention and read in the hearing of the jury on his cross-examination, he was called upon to explain it to them or lose his right to do so, by way of subsequent rebuttal. *P. & T. R. Co. v. Stimpson*, 14 Pet. 448, 461. Having elicited his explanation, plaintiffs closed their case. They were not compelled to anticipate the introduction of the sworn statement of the other plaintiffs. In support of his case the defendant read these sworn statements of Bushrod Robinson and William L. Chery from the

bill and answer in the former suits in equity. Having been read to the jury by the defendant in the maintenance of his case as solemn admissions of the two parties, we think they constituted new matter which the plaintiffs had the right to call upon the proper witnesses to explain, if possible; and their exclusion was erroneous.

2. What may constitute the legal relation of partnership between two or more persons in a given matter is a question of both fact and law. Persons may become copartners without a special agreement for the purpose, by virtue of the effect which the law gives to an undertaking for the use of a common capital with division of profits and losses, in continuous transactions, though carried on in an incidental manner. Therefore, if the plaintiffs, without a special or express agreement to form a partnership, contributed a fund to be invested as occasion offered in notes, stocks and the like, and agreed to share the gains and losses thereof between them, they thereby become partners in the view of the law, and the court properly instructed the jury to that effect as requested by the plaintiffs. *Ward v. Thompson*, 22 How. 330, 333; 17 Am. & Eng. Encyc. Law, 830 *et seq.*; 1 Lindley, Part., 16 and 19; 1 Bates, Part., Secs. 17 and 26.

To enable the jury to give proper weight to the sworn statements that the several plaintiffs had formerly made, averring joint interest in the fund deposited to the credit of "Robinson, Chery and Robinson," but denying that they were copartners, it would have been proper, at the request of the plaintiffs, to explain to them that if they believed the plaintiffs had, in the beginning, agreed to operate with the joint fund and share the profits and losses, they would be partners in contemplation of law, whether or not they so understood the effect of the agreement at the time; and, in that event, the subsequent declarations of one or all that they were not partners could not have operation to alter or destroy that relation. The legal effect of the agreement under which the three parties operated did not rest on their

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opinions in respect of it. *Lintner v. Milliken*, 47 Ill. 178, 181. This was, no doubt, the purpose sought to be subserved by the special instruction asked by the plaintiffs, the refusal of which is the foundation of the second assignment of error; but it was not expressed with sufficient clearness therein to require its submission to the jury. It informed the jury that if the partnership relation existed as defined in the first special instruction given, it "could not be affected by subsequent declarations by any one or all of the parties concerned." This was true, but not to the full extent that the jury might have inferred from the unqualified terms of the instruction. Those declarations, as we have seen, could not affect the relations of the parties, if the facts averred of the original agreement were found to be true. But there was another object in their introduction as evidence, and that was to impeach the credibility of the witnesses in respect of the facts testified to by them as constituting the said agreement, and the jury should have had their attention called to the distinction. Considered in this second point of view, they might possibly have affected the relations of the parties in the opinion of the jury; and the defendant was entitled to the benefit of whatever weight they might have given them. As the instruction was not presented in an unobjectionable form, the court was not required to amend it, and its refusal therefore does not constitute reversible error.

3. As this case must be remanded for a new trial, a question of practice appears in the record that deserves consideration, for it may be made the subject of exception, although not now formally raised. It was assumed on the trial, and not controverted, that the denial of the partnership of the plaintiffs, filed by the defendant in the form of a special plea, was a plea in abatement strictly, and in consequence could not be accompanied by an ordinary plea in bar. Is this a correct view of the nature and function of this special plea denying partnership as alleged? According to the immemorial rule of the common law practice, the plain-

tiffs, alleging a partnership, were compelled to prove it in order to maintain their case. To prevent useless consumption of time in making formal proof of facts about which there was no real controversy, the Supreme Court of the District of Columbia, under the power vested in it by Congress, adopted a rule for the purpose. That rule reads: "The special character in which the plaintiff sues shall not be considered to be in issue or necessary to be proved, unless, by special plea under oath as to the truth thereof, the same be denied." Com. Law Rule, 112. A plea in abatement, properly so called, sets up an independent fact that, if true, puts an end to the action without regard to the merits. Having pleaded the fact in abatement, the defendant is required to prove it. It does not put the plaintiff upon proof of anything that he was not required to prove without it. The special plea denying partnership as alleged requires no proof in its support. Its sole purpose and effect is to put the plaintiff upon proof of that which, before the adoption of the rule, he was compelled to prove without a special denial. We do not think this rule should be regarded as changing or affecting the manner and order of pleading, but rather as a rule of evidence governing in the trial. The rule aforesaid was no doubt suggested by the statutes prevailing in many of the States at the time of its adoption, whereby, in order to prevent unnecessary costs and consumption of time, presumptions were raised of the truth of certain formal allegations, unless they should be specially denied under oath. A statute of that purport, enacted in Illinois, and which is set out in part in *Cooper v. Coates*, 21 Wall. 105—a case cited by the appellee—was construed by the Supreme Court of that State, at a very early day, to make no change in the rules of pleading. *Stevenson v. Farnsworth*, 1 Gilman, 715, 717. The rule of our court having been devised to remedy a specific mischief, its construction ought to be as liberal as its terms will admit. Its efficacy would be much impaired if an attempt to avail one's self of it

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must be treated as a technical plea in abatement, and subject to all the incidents of such a plea under our practice.

We are of opinion, therefore, that the denial of the partnership in this case is not to be regarded as a technical plea in abatement; but as a plea of special denial consistent with the ordinary pleas in bar, provided for by the rules and cognizable with them.

For the error pointed out the judgment will be reversed, with costs to the appellants, and the cause remanded, with directions to set aside the verdict and award a new trial, It is so ordered.

*Reversed and remanded.*

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## SONNEMANN v. LOEB.

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### HUSBAND AND WIFE; PROMISSORY NOTES.

1. Where a married woman purchases real estate and gives as part payment of the purchase money the promissory notes of herself and husband secured by deed of trust upon the property, the notes have relation to her sole and separate estate within the meaning of R. S. D. C., Sec. 727, and a suit is maintainable thereon against her under R. S. D. C., Sec. 728, giving a married woman power to contract, sue, and be sued in her own name in all matters having relation to her sole and separate property, as if unmarried.
2. Whether a distinction between the executed and executory contracts of a married woman can properly apply in any case arising under the Married Woman's Act in force in this District, *quære*.

No. 661. Submitted April 23, 1897. Decided May 25, 1897.

HEARING on an appeal by the defendant from a judgment on demurrer to a plea of coverture in an action on several promissory notes. *Affirmed*.

The facts are sufficiently stated in the opinion.

*Mr. Henry M. Earle* for the appellant:

A very broad discrimination is to be made between a

woman's contracting as to her sole and separate estate, as she has undoubtedly the right to do, and in her making a purchase of a new estate, giving in consideration therefor her personal obligation, and no reference being made therein to property already hers, nor any pledged in the purchase. A right to contract in matters having relation to sole and separate estate, very materially differs from the right to enter into an executory contract for the purchase of a new estate. *Jones v. Crossthwaite*, 17 Iowa, 402; *Ames v. Foster*, 42 N. H. 381.

It is not denied that the notes sued upon became a charge upon the specific property mentioned; the vendor's lien created by the purchase never amounted to more than this. The delivery of the note placed the vendor in no different position, and could in no manner overcome the clear intent of the statute, and thereby subject the married woman to the terms of the trust or mortgage in relation to her sole and separate estate. In this connection it should be borne in mind that although the property was conveyed to Eliza J. Sonnemann, the very terms of the negotiations were such that the trust or mortgage should be given "in part payment of the purchase money." It is too broad an interpretation of the statute to hold that the contract was under these circumstances made in relation to her separate estate; it would seem rather to relate to that of the vendor.

A married woman may buy with the cash of her own separate estate, and contract in relation thereto, but should she buy for credit, the property being charged with the price, it would be merely a conditional conveyance, not a purchase. If the law could call this a purchase, as of her sole and separate estate, she could be permitted to create a personal obligation thereon, concerning her own right and separate estate, but it is not the implied intent of the statute to thus devise a new way by which a married woman may acquire property by her sole and separate estate. These statutes are not enabling acts.

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The acquiring of this property was not by such method as was within the contemplation of the statute, and the property could not have thus become hers, to such an extent that allowed her obligation to become more than a charge upon the property. No contract was made which includes the pledge of her separate estate. This contract was merely in anticipation of a purchase of such separate estate, and the obligations were unauthorized by the act. It is the status as a proprietor that the statute seeks to regulate, not the power of the woman to make contracts, or her capacity to acquire property. The statute relates only to property acquired by her, in ways known to the common law, and was framed, having in contemplation the manner in which a married woman, at common law, could acquire a separate estate. The words "having relation to her sole and separate estate" are for the purpose of limiting the range of contracts; had the purpose been other than this, Congress would have omitted them, and the married woman would have had unlimited range to contract. *Goldsmith v. Ladson*, 20 Mackey, 221; *Schneider v. Garland*, 1 Mackey, 335; *Hitchcock v. Richold*, 5 Mackey, 414; *Ames v. Foster*, 42 N. H. 381; *Seitz v. Mitchell*, 4 Otto, 585.

Mr. D. W. Baker and Mr. Adolph G. Wolf for the appellees:

That a married woman is liable on such a contract as that here sued on has been well settled by the adjudicated cases. *Ballin v. Dillaye*, 37 N. Y. 35; *Stewart v. Jenkins*, 6 Allen, 300. Our statute says, "in all matters having relation to her sole and separate property," thus being almost the same as the statutes in the cases above quoted. "Relation," according to Worcester, is a "connection between things as a subject of the understanding." Its synonyms are reference, respect, regard. (Soule's English Synonyms.)

The statute was not designed to abridge the powers of married women, or to give them less authority over their

separate estate, which might be held by them free from the control or interference of their husbands, than they had at common law over lands held by them in their own right. *Bartlett v. Bartlett*, 4 Allen, 440, 443. The wife may charge her legal separate estate, created by statute, to the same extent and for the same purposes that she could have charged her equitable separate estate created by an instrument of trust. Kelly's Contracts of Married Women, p. 265, and citations; *Ballin v. Dillaye*, 37 N. Y. 35.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

This case presents a question as to the construction of the Married Woman's Act of 1869, as embodied in Sections 727 and 729 of the Revised Statutes relating to the District of Columbia.

The action was brought to recover on three promissory notes, made by the appellant, Eliza J. Sonnemann, and her husband to the appellee, Meyer Loeb, amounting in the aggregate to the sum of \$1,500, and which notes were given for part of purchase money for real estate purchased of and conveyed to the appellant, a married woman, by the appellee.

The question in the case is raised by a demurrer of the appellee, the plaintiff below, to the plea of the appellant, in which her coverture is set up as a bar to the recovery on the notes. The facts as set out in the plea are thus stated:

"That she, the defendant, was at the time of the making of the said supposed promises in the declaration alleged, and now is, the wife of the defendant, Theodore Sonnemann, and that she purchased of the plaintiff certain real estate, and in part payment of the purchase money she, the defendant, and the defendant, Theodore Sonnemann, at the time of the delivery to the defendant, Eliza J. Sonnemann, of the deed for said real estate, executed and delivered to the plaintiff their certain promissory notes, aggregating the sum of fifteen hundred dollars, which are the several contracts sued upon in the several counts of said declaration, and that said defend-

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ant Eliza J. Sonnemann and the defendant Theodore Sonnemann secured said notes, at said time aforesaid, by a deed of trust in the nature of a mortgage on said real estate, the said deed of trust bearing date the 28th day of September, 1894; without this, that the defendant, Eliza J. Sonnemann, undertook and promised in manner and form as in the first, third, fourth, sixth, seventh and ninth counts of the said declaration alleged."

To this plea the plaintiff demurred; and the court sustained the demurrer, and entered judgment for the plaintiff for the amount of the notes.

The question is, whether the notes were given in a matter having relation to the sole and separate property of the appellant, as if she were unmarried.

Section 727, Revised Statutes, District of Columbia, provides that the right of any married woman to any property, personal or real, acquired during marriage in any other way than by gift or conveyance from her husband, *shall be as absolute as if she were unmarried*, and shall not be subject to the disposal of her husband, nor be liable for his debts. And by Section 729, it is provided that any married woman may contract and sue and be sued, in her own name, *in all matters having relation to her sole and separate property in the same manner as if she were unmarried*.

If the appellant were unmarried, there could be no question of her liability on the notes; and as the property for which the notes were given was, by the statute, made her sole and separate property, the moment of its purchase, it is difficult to perceive why the contract to secure the payment of the purchase money, did not have relation to her sole and separate property. In this case the deed was made, and the contract of purchase consummated, when the notes were passed; and it would, therefore, seem to be too plain for question that the notes had relation to the property thus acquired by the wife, as her sole and separate property. We think there ought to be no doubt as to this question,

and that the ruling of the court below upon the demurrer to the appellant's plea was entirely correct. And if authority for the support of that ruling were deemed necessary, it would be found in the cases of *Ballin v. Dillaye*, 37 N. Y. 35, and *Stewart v. Jenkins*, 6 Allen, 300, referred to by the counsel of the appellee.

In the last mentioned case, in construing a statute very similar in terms to that here under consideration, the court said, that "the most liberal application of the statute could hardly change the result at which we have arrived. The conveyance of the real estate and the delivery of the note in suit were simultaneous. The note was without consideration, and of no force or effect, except in consequence of the vesting of the estate in her as her sole and separate property. She was competent to receive the conveyance, and it passed the title to the land. It would be hard to say, that the contract to pay for the land which she thus took and held was not entered into 'in reference to her separate property.'"

The case of *Ritch v. Hyatt*, 3 MacArthur, 536, is mainly relied on by the appellant to support her defence made by her plea. But without stopping to point out the circumstances that distinguish that case from the present, it is sufficient to say that the distinction taken in that case, between an executory and an executed contract, and upon which distinction the opinion of the majority of the court appears to be founded, has no application to the facts of this case. Whether such distinction can properly apply in any case arising under the Married Woman's Act, is a question in regard to which we express no opinion.

We think the judgment ought to be affirmed; and it is so ordered.

*Judgment affirmed.*

## PATTEN v. WARNER.

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CONTRACTS; MUTUALITY; TRUSTS AND TRUSTEES; STATUTE OF LIMITATIONS IN EQUITY; ATTORNEY AND CLIENT.

1. To create a binding contract the minds of the parties must meet in a contractual relation.
2. The mere reposing of confidence does not create a trust cognizable in equity or convert into a trustee the person in whom confidence has been reposed; but the assent, express or implied, of the person sought to be placed in such fiduciary relation, or where a trust has been devolved in consequence of privity of estate, or for any other reason, the assent of the person from whom such trust has been derived, must be shown in order to charge such person as a trustee.
3. The statute of limitations is equally a bar in equity as at common law in a case where there is concurrent jurisdiction, as in a suit for an accounting; *following Sis v. Boarman, ante, p. 116.*
4. The knowledge of an attorney, whether communicated to his clients or not, in a given case, *held* to bind his clients.

No. 665. Submitted April 29, 1897. Decided May 25, 1897.

HEARING on an appeal by the complainants from a decree dismissing a bill in equity for an accounting. *Affirmed.*

The Court in its opinion stated the case as follows:

The appellants, Josephine A. Patten, Mary E. Patten, Edythe A. Patten and Helen Patten, were, during the earlier months of the year 1889, the owners, as tenants in common, of a four-fifths interest in a certain piece of real estate on F street, in the city of Washington. Their married sister, Mrs. Augusta Glover, with whom and with whose husband their relations at the time were not entirely friendly, was the owner of the remaining one-fifth interest in the property. The property had been derived to them from their deceased mother; and deeming it desirable that they should hold it all, the complainants wished to purchase the Glover interest. For the reason intimated, however, they

did not wish to communicate directly with the Glovers in regard to it, nor did they even wish it to be known by them that they (the appellants) desired the property. It seems to have been supposed that the Glovers would not sell at all to the complainants, although they might be induced to dispose of the property to other persons. The appellants communicated with their attorney, Mr. Henry E. Davis, on the subject, and Mr. Davis communicated with the appellee, Brainard H. Warner.

The appellee was in the business of dealing in real estate as a member of the firm of B. H. Warner & Co., and was also at that time the president of the Columbia National Bank. That bank held a note given by Mrs. Glover and indorsed by her husband, originally for \$5,000 and afterwards curtailed to \$3,500, which the appellee had been instrumental in causing the bank to take. There was a question raised as to the validity of that note—mainly, it would seem, on the ground that the maker of it was a married woman, and it was very doubtful whether it had been executed with reference to her separate estate, and also probably because it was not secured by any conveyance of property. How the knowledge of the existence of that note came to the complainants is not entirely clear from the record before us; nor, perhaps, is it important. It seems, however, that they communicated that fact to their attorney, and that Mr. Davis thereupon sought to make it the instrumentality by which he might acquire for his clients the interest in the F street property which they desired to purchase.

Mrs. Glover, in conjunction with some of the complainants, her sisters, had been appointed administratrix of the personal estate of her mother. In order to procure the necessary administration bond, she had executed a deed of trust by way of mortgage of her interest in the estate derived from her mother, the penalty being in a very large amount. From this deed of trust, whether by accident or

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design does not appear, her interest in the F street property had been omitted. Mr. Davis suggested to the appellee Warner that he might to some extent secure the note in question by procuring a deed of trust from the Glovers upon the F street property. The suggestion was eagerly accepted. Mr. Davis procured from the land records of the District a description of the property, for which service he received compensation from Warner, and the latter, after much effort, procured the execution by the Glovers, in New York, on September 19, 1889, of the desired deed of trust upon the F street property. The deed purported to secure a promissory note for \$5,000, to which figure the loan had been again advanced, or was agreed to be advanced, as a consideration for the execution of the deed. There is some discrepancy in the record, which probably is not important, with regard to the date of this new note. The deed of trust recites it as being the 19th of September, 1889, the same as the date of the deed, while the records of the bank would show it to have been September 23, 1889. It was payable six months after date.

Thus far there is no dispute about the facts, or, at all events, they are satisfactorily proved. But the subsequent transactions and the previous circumstances that led up to them are in controversy, and it is difficult, if not impossible, to reconcile the conflicting statements of the parties, and the testimony adduced by them in support of those statements.

The claim of the complainants, as stated in their bill filed in this cause, is, "that at or about the time of the said advice or information given by said Davis to said Warner, the said Davis informed said Warner that he, said Warner, could, in return for the assistance and advice then given him, secure for the complainants, the said interest of the said Augusta P. Glover in said real estate; and that if he would so do these complainants would purchase the same and would assume and pay the incumbrance which Mrs. Glover should

place thereon to secure the indebtedness aforesaid; . . . that at said time the said Davis cautioned the said Warner not to disclose to Mrs. Glover or her husband that these complainants were the real purchasers of said property, as, if the said Glovers should become aware of the fact that these complainants desired to purchase the said interest in said property, they, the said Glovers, would refuse to sell the same;" and "that thereupon the said Warner assented to said proposition, and undertook and agreed with the said Davis to negotiate with the said Glovers and purchase from them the interest of the said Glovers in the said real estate for the benefit of these complainants."

The appellee, on the other hand, denied that he was in any manner employed as an agent in the business for the appellants, or that there was any such proposition made to him by Mr. Davis or assented to by him; and he averred that he purchased the Glover interest for himself and with his own money, knowing full well, however, that the complainants would purchase from him.

At all events, negotiations were opened between the appellee and the Glovers for the purchase by the former of the F street lot, or the Glover interest in it. It is claimed by the appellants that the appellee broached the matter to Mr. Glover in pursuance of his understanding with Mr. Davis. Mr. Warner intimates, although he is not certain of it, that Mr. Glover broached the matter to him. Presumably, the negotiation, however initiated, was not commenced until after the execution of the deed of trust to secure the note for \$5,000; that is, after September 19, 1889. The result of the negotiations was that, on November 16, 1889, an agreement for the purchase of the Glover interest in the F street property was entered into between Warner and the Glovers, and a check of B. H. Warner & Co. for \$500, with a memorandum upon it that it was a deposit for the purchase of part of lot 13, in square 290, which was the F street property, was drawn to the order of Mrs. Glover, and apparently sent

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to her in New York, where it was deposited in bank for collection. It was paid in Washington on November 21, 1889.

A check of B. H. Warner for \$2,000, dated on November 22, 1889, and paid in Washington on November 26, 1889, and a check of B. H. Warner for \$3,500, dated on November 23, 1889, and paid in Washington on November 30, 1889, were similarly drawn to the order of Mrs. Glover and deposited by her in New York for collection. On November 30, 1889, the Glover note in the Columbia National Bank for \$5,000, with the accrued interest amounting to \$50, was paid by check of B. H. Warner for \$5,050. Subsequently, two other checks, testified by the appellee to have been given on the same account, one for \$200, dated January 25, 1890, and paid in Washington on February 3, 1890, and the other for \$44.79, dated February 26, 1890, and paid in Washington on March 17, 1890, were drawn by him to the order of Mrs. Glover, and transmitted to New York.

The sum total of these payments is \$11,294.79, and this sum the appellee testifies in this cause to have paid to Mrs. Glover on account of his purchase. But whether this sum was the sum agreed upon in the negotiations, or how it was reached if it was so agreed upon, or why it was divided into the several checks that have been recited, the record does not show, and there is no attempt to explain. It may be inferred that the agreed amount of the purchase money, subject to the deed of trust, was \$6,000; for that is the amount of the several checks that were delivered at or about the time, the smaller checks (\$200 and \$44.79) having evidently been given for some subsequent adjustment of the matter or for some subsequent consideration.

On November 16, 1889, which seems to have been the day on which the agreement was made, as would appear from the memorandum on the check for \$500 already mentioned, the Glovers executed and acknowledged in Washington the deed of conveyance of their interest in the F street property to the appellee, Warner. But it is doubtful whether the

deed was then delivered. The inference would rather be that it was not then delivered to the appellee, or that if it was then delivered, it was not to be recorded until the later day; and it was not in fact recorded until November 23, 1889, when the check for \$3,500, completing the sum of \$6,000 for the interest, was delivered or transmitted by the appellee Warner to Mrs. Glover. This deed recites a merely nominal consideration of ten dollars.

Very soon after the execution of the deed of conveyance by the Glovers to Warner, and very probably either on the day of the actual execution of the deed or on the day of its delivery to him, if those days were different, as they seem to have been, Warner communicated with Davis by telephone; and there were various communications between them on subsequent days. They differ greatly in their testimony as to the purport of these communications; and especially as to the purport of the first communication by telephone. One feature of it, at least, is beyond question; and that is, that Mr. Warner then informed Mr. Davis that he (Warner) had procured the deed, or the title to the property in question, and was prepared to transfer it for \$13,000. Mr. Davis testifies that he understood the purport of the communication to be that Mr. Warner had taken the property from the Glovers for \$13,000, and was ready to transfer it to the appellants upon the payment or repayment to him of that amount. Mr. Warner's testimony is to the effect that, having secured the title for himself, he was now ready to deal with the purchaser whom Mr. Davis had stated he would produce or procure for him.

Mr. Davis thereupon procured the sum of \$13,000 from his clients by means of a promissory note negotiated for them by him with Riggs & Co.; paid that sum to Warner, and received from Warner a deed of conveyance to the appellants, and a deed of release of the deed of trust to secure the \$5,000. This transaction must have occurred, according to the testimony of Mr. Davis, on November 30, 1889;

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for, although the deed from Warner to the appellants bears date and was executed on the previous day, November 29, the execution of the deed of release was on November 30, and Mr. Davis states that both deeds were delivered to him at the time that he paid the \$13,000. Mr. Warner admits, however, that he drew upon this sum of \$13,000 in order to pay the Glover note of \$5,000.

The deeds were delivered for record and duly recorded, and the transaction was presumed to be at an end. Very soon afterwards, however, during the winter immediately following of 1889-90, the complainants in some way learned, or at all events heard some rumor, to the effect that they had paid more to Warner than he had paid to the Glovers; and there were reports that came to the ears of Warner that he had taken undue advantage of the appellants in the transaction. The affair culminated in a stormy scene at the office of Messrs. Shellabarger & Wilson, where Mr. Shellabarger, Mr. Glover, Mr. Davis and Mr. Warner met in order to probe the matter and to ascertain the source of the rumors. The meeting broke up without satisfactory result. But either at the meeting or in coming away from it—for they differ as to the time, although they agree as to the fact—Mr. Warner stated to Mr. Davis that he (Warner) had undoubtedly made a profit by the transaction, as he considered that he had a right to do. And Mr. Warner claims, and there is testimony tending to show, that he had at least on one previous occasion made a similar statement to Mr. Davis.

Here the matter seems to have rested, so far as the record shows, until September of 1893, when one of the complainants, Miss Josephine Patten, meeting her sister, Mrs. Glover, in New York, was informed by her that Mr. Warner had paid her, not \$13,000, but only about \$9,000 for the interest which he had purchased from her. And the complainants claim that this was the first positive information which they had, or by reasonable diligence could have had, of the true facts of the case. The next step was to file the bill of com-

plaint in this suit, on June 2, 1894, for discovery and an account, and the recovery from Warner of the difference between the amount paid by him to the Glovers and the sum of \$13,000. The defendant Warner denied all the equity of the bill.

After replication filed and testimony taken, the cause came on for hearing; and thereon the court below dismissed the bill. From the decree of dismissal the complainants have appealed to this court.

*Mr. Wm. G. Johnson* for the appellants:

No consideration is essential to establish a confidence between persons nor to redress in equity the abuse of it when it has been established and abused. Nor is any technical relation between the parties essential. It is sufficient that confidence shall be shown to have been reposed by one person in another, in order to invoke the principle of equity for its preservation against abuse. Paley on Agency (3d Am. Ed.), p. 12; 2 Sugden on Vendors (7th Am. Ed.), Sec. 3, Par. 1, p. 362; *Michoud v. Girod*, 4 How. 554; *Perry on Trusts*, Sec. 210; *Brooks v. Martin*, 2 Wall. 70; *Rankin v. Porter*, 7 Watts, 390; *Smith v. Kay*, 7 H. L. 779; *Sheriff v. Neal*, 6 Watts, 534; *Wakeman v. Dodd*, 27 N. J. Eq. 566-567.

It is not contended that one man may not make a profit out of a transaction with another though he has acquaintance with the private and confidential affairs of that other. But it is contended that where the private affairs of another are voluntarily disclosed under express or implied confidence an abuse of that confidence will not be permitted. There is no room for doubt that the defendant knew he was being admitted into the confidence of the complainants by their counsel, and in their interest, and he was brought within the rule laid down by Lord Eldon, in the leading case on this branch of equity jurisprudence, that—"the language of a court of justice has in all times been, that, if a man does not choose to act upon the confidence, appearing in the course

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of the transaction, to be so reposed in him, he ought to reject it as soon as proposed." *Huguenin v. Basely*, 14 Ves. Jr. 294. The confidence thus reposed in the defendant was not rejected, but on the contrary was eagerly accepted, though, as appears from his testimony, from no worthy motive. The effect of this was to make him a trustee. *Coates' Appeal*, 2 Pa. St. 133.

*Mr. John B. Larner* and *Mr. A. S. Worthington* for the appellee.

Mr. Justice MORRIS delivered the opinion of the Court:

The main question in this case is one of fact rather than of law. It is whether in the purchase of property that has been mentioned, the appellee should be held to have acted on his own account or as trustee for the appellants.

It is very clear that the appellants cannot justly be held entitled to recover in the suit, except upon the theory, either that there was an express agreement between them and the appellee, whereby the latter agreed to act as their agent in the transaction out of which this controversy has arisen, or else that there was established between them such a fiduciary relation of trust and confidence as should estop and preclude the appellee from claiming to have acted in his own individual right and for his own personal benefit. The bill of complaint is based upon the first of these two alternatives, and alleges, as we have seen, an express agreement between the parties. But in the argument before us, while not wholly abandoning this ground of action, the contention for the complainants seems to be rested mainly upon the second alternative, the alleged existence of fiduciary relations between the parties.

Certainly the record fails to show the existence of any express agreement between the appellants and the appellee. That agreement is alleged in the bill, and denied in the answer; and that denial is emphasized by the appellee in his testimony when called as a witness on his own behalf. The

testimony of Mr. Davis, which alone supports the contention of the appellants in that regard, shows rather a vague understanding on his part of the establishment of some agreement between himself and the appellee than the existence of any definite or positive agreement. Whether it be that the recollection of parties and of witnesses has been dimmed by lapse of time; or that the mistake was made, not entirely uncommon under such circumstances, of supposing something to have been done, which it was intended and desired to do, but which was not actually done; or that so much reliance was carelessly placed upon the sentiment of honor as that parties were induced to forego the precautions required by law for the creation or justification of contracts having reference to real estate; certain it is that the testimony falls far short of the requirements of a court of equity in the establishment of a contract or agreement denied by the answer of the appellee as defendant in the cause. The fundamental element of mutuality was wanting to establish any such contractual relation. If, after the procurement of the deed of trust to secure the note for \$5,000, the appellee had resolved to go no farther, and had even informed Mr. Davis that he would go no farther in the matter, it is difficult to see how, either in law or in equity, upon the testimony contained in the record before us, the appellee could be held for a breach of contract. If, after the conveyance to him of the property for the sum of \$11,000 or \$11,300, or whatever he actually paid for it, the appellee, assuming that he was the agent of the appellants, had called upon them to take the property off his hands at that figure, and they had declined for the reason that they considered the price excessive, and repudiated or denied the existence of any agreement, it is difficult to see how, upon the testimony before us, a court of equity could justly have required them to take the property and to refund to the appellee the sum paid by him for it. And if, in the absence of proof of express agreement, and in the absence of any memorandum whatever in writing, and

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in the absence of any understanding of any kind in regard to the price and terms of purchase, the complainants would not, under such circumstances, be constrained to take the property, then most undoubtedly no converse duty to convey to them could be imposed upon the appellee.

It is a singular fact that throughout this whole transaction, so far as the record shows, there was never mention at any time of the price which the appellants were willing to pay for the property until after the appellee had procured the title for himself; nor was there even the remotest allusion to that exceedingly important circumstance. And certainly it can not be that the appellants intended to bind themselves irrevocably to pay to the appellee any sum for the property which he might consider it worth and might choose to pay for it. On the other hand, if they did not so bind themselves, there was no valid contract at all; for, as we have said, the essential element of mutuality was wanting.

It is quite evident that, in the most favorable view that we can take of the case of the appellants, too much was left to inference, and the minds of the parties never actually met in contractual relation.

But if express contract was absent in this case, the record equally fails to disclose the existence of any such fiduciary relation between the parties as would justify the conclusion that the appellee should be held as a trustee for the appellants.

Confidence and trust are said to be synonymous; and it is claimed that one who confides in another and whose confidence is accepted by that other and acted on by him, is entitled to assume that undue advantage will not be taken of the trust so reposed. Various authorities are cited in support of this proposition. As, for instance, in the case of *Coates' Appeal*, 2 Pa. St. 133, the Supreme Court of Pennsylvania said:

"The word *confidence*, be it remarked, is a word peculiarly

appropriate to create a trust. It is as applicable to the subject of a trust, as nearly a synonym as the English language is capable of. *Trust* is a confidence which one man reposes in another, and confidence is a trust."

The same court also said in the case of *Rankin v. Porter*, 7 Watts, 390: "The ground of the decision is that, wherever confidence has been reposed, justice forbids that it shall be abused; and it applies as strongly to those who have gratuitously or officiously undertaken the management of another's property as to those who are retained and paid for it. The man who offers his services to a distant owner, who promises to examine the property and ascertain the price which can be obtained for it, and especially if he proposes to do this from friendship, must not expect to gain from imposing on the confidence he has excited."

Perhaps the idea is still more broadly and sweepingly stated by one of the judges in the case of *Smith v. Kay*, 7 H. L. 779, when he said: "The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed."

All this is undoubtedly the dictate of honor and of true morality; and perhaps it is to be wished that courts of equity could enforce the doctrine to the extreme limit to which by a literal construction of its terms it might be held to extend. But we well know that, although a court of equity is a court of conscience, not everything binding upon the conscience, not everything binding upon the sense of honor, can be enforced in a court of equity. Not every trust and confidence is there cognizable. On the contrary, it is daily experience, especially in matters connected with dealings in real estate, that trust and confidence are often abused beyond the limits within which a court of equity can intervene. We should not seek unduly to circumscribe and limit the functions of a court of equity in such matters; it is in the interest of justice that they should be allowed the broadest possible sphere of operation. And

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yet we are not warranted in extending that sphere to the limit claimed in the present case.

It is the result of an examination of all the cases that the mere reposing of confidence does not of itself create a trust, or convert into a trustee the person in whom confidence has been reposed; but that the relation of trust must first, or perhaps simultaneously, be created, and thereupon the confidence reposed. Otherwise, it would be in the power of any one, by his voluntary, unsolicited, officious, and perhaps undesirable act, to convert another into a trustee for him, and thereby perhaps most unjustly to tie his hands. A confidential communication to a stranger, who occupies no fiduciary relation whatever to the person confiding in him, cannot create a trust. Neither can a trust be created by a confidential communication made to him in the hope or expectation that he will assume such fiduciary relation and he does not actually agree to assume it. The assent, express or implied, of the person sought to be placed in such fiduciary relation, or where a trust has been devolved in consequence of privity of estate or for any other reason, the assent of the person from whom such trust has been derived, would seem to be involved in all cases. (See 1 Leading Cases in Equity, p. 62, and notes.) We think that the mere reposing of confidence, without the assent, express or implied, of the person in whom the confidence is reposed, to act in a fiduciary capacity towards the person who confides in him, does not create a trust cognizable in equity, however dishonorable the violation of such confidence may be from the standpoint of the moralist. And if it be argued that in this case there was an agreement on the part of the appellee to hold such fiduciary relation towards the appellants, that merely brings us back again to the first question—whether there was any agreement between the parties—a question to which the record has compelled a negative answer.

But whatever may be the substantial merits of this case, it is very clear to us that there is one consideration which

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must dispose of it adversely to the appellants. The suit is for an accounting. It is a case where there is concurrent jurisdiction at common law and in equity. A plea of the statute of limitations would undoubtedly be a bar to the demand at common law. This statute must be equally held in equity as a bar to this proceeding. See *Sis v. Boarman*, ante, p. 116.

It is sought to escape from this conclusion by an attempt to show that the appellee's alleged fraud upon the rights of the appellants was not discovered by the latter until September of 1893, and that they instituted their suit in due time thereafter. But they had as much accurate knowledge in 1889 or 1890 as they acquired in 1893. It is of no consequence, perhaps, that Mrs. Glover was strangely mistaken in 1893 as to the amount of money paid to her for the property by the appellee in 1889. The substantial fact which she then communicated to the appellants was, that there was a considerable difference between the amount paid to her by the appellee and the amount which the appellee demanded and received from the complainants. Their attorney had this same knowledge in 1889 or 1890; for there can be no doubt whatever that he was then informed by the appellee, that he (the appellee) had made a profit in the transaction, and he then and there offered to tell him the precise amount of his profit. Mr. Davis at the time was the general attorney of the appellants; he had been their attorney specially in this whole transaction with the appellee; he had even been specially charged by them to ascertain what profit, if any, the appellee had made; for there is testimony tending to show that very soon after the consummation of the transaction their suspicions on this point were aroused. The knowledge of Mr. Davis, under the circumstances, whether communicated to them or not, and the knowledge which he readily might have acquired from the appellee, who offered to disclose to him the amount of his profits, must be imputed to the appellants. There is

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no reason whatever why this bill filed in 1894 might not equally well have been filed in 1890. The luck of memory and the indistinctness of recollection which now characterizes the testimony, might then perhaps have been avoided. We are compelled to conclude that the suit now comes too late.

It follows that the decree appealed from must be *affirmed*, *with costs*. *And it is so ordered*.

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DANIELS v. SOLOMON.

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ATTACHMENT; PLEADING AND PRACTICE; BURDEN OF PROOF.

1. One who claims a lien upon attached property has the same right to intervene in the attachment proceedings as one who claims title to the property.
2. A petition of intervention by judgment creditors in attachment proceedings which fails to allege that the defendants in attachment have no other property than that attached upon which the intervenors may levy execution is demurrable, but the defect is not a jurisdictional one, and may be cured by verdict and judgment.
3. The issue of a writ of execution on a judgment of a justice of the peace and a notice of that fact by the constable having the writ to the marshal who holds property of the judgment debtor under an attachment, is the equivalent of an actual levy by the constable, and will authorize the judgment creditors to intervene in the attachment proceedings.
4. Under the attachment law of the District, when the defendant's affidavit traverses the plaintiff's affidavit, upon which the writ was issued by the clerk, the burden of proof is upon the plaintiff to prove the facts alleged by him; and where judgment creditors of the defendants in attachment intervene in the proceeding, they become virtually defendants therein, with the right to traverse the affidavit in support of the attachment.
5. But where such intervenors charge collusion between the plaintiff and defendants in attachment for the purpose of allowing

the plaintiff to obtain unlawful preference over the intervenors and other creditors of the defendants, the burden of proof is upon the intervenors to prove such charge.

No. 668. Submitted April 30, 1897. Decided May 25, 1897.

HEARING on an appeal by the intervenors in an attachment proceeding from a judgment dismissing a petition of intervention. *Reversed.*

The COURT in its opinion stated the case as follows:

The appellants, Bernard Daniel and Jacob Blumenthal, have appealed from a judgment of the Supreme Court of the District of Columbia, dismissing a petition of intervention filed by them in an action of debt depending in said court between Elias Solomon, as plaintiff, and Stern and Livingston, as defendants. Solomon commenced said suit December 26, 1896, upon two notes amounting together to the sum of \$1,400. At the same time he sued out a writ of attachment against them on the ground that they had assigned, disposed of and secreted, and were about to assign, dispose of and secrete, their property with intent to hinder, delay and defraud their creditors. The writ of attachment was executed by the marshal by seizing the goods of the defendants.

On January 21, 1897, appellants filed their plea of intervention in which they alleged: (1) That they had obtained a judgment against defendants for the sum of \$162.50, besides costs, in the court of a justice of the peace of said District, and that a *fi. fa.* thereon had been issued and delivered to a constable for execution. (2) That no real ground existed for plaintiff's attachment. (3) That the affidavit does not state facts justifying the attachment. (4) That defendants have done all in their power to expedite a judgment in favor of the plaintiff, and have colluded, and are now colluding, with him for the purpose of enabling him to obtain an unlawful preference over the intervenors and other creditors. (5) They pray to be allowed to contest the

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sufficiency of the affidavits of the plaintiff; to traverse the grounds of attachment stated in said affidavits, and to have an issue as to the existence of said grounds of attachment and the validity thereof.

The petition was sworn to and accompanied by a separate affidavit specifically denying that, at the time of suing out plaintiff's attachment the defendants had transferred and secreted, or were about to transfer and secrete, their goods for the purpose of hindering, delaying or defrauding the plaintiffs; and reiterating the charge of collusion between plaintiff and defendants. No objection was taken to the petition on any ground, and upon the motion of intervenors an issue was framed: "Whether the ground of attachment set forth in the plaintiff's affidavit existed at the time of the issuance of the attachment?"

This was set down for trial by jury, and the court ruled that the intervenors had the affirmative of the issue and that the burden of proof was upon them. To this ruling the intervenors objected and reserved an exception. After the evidence was in, the court instructed the jury to find a verdict for the plaintiff, and thereupon entered a judgment dismissing the petition.

*Mr. Chapman W. Maupin* for the appellants:

1. The trial court erred in that, after declaring that the issue in the case was as to whether the grounds of attachment stated in the plaintiff's affidavit existed, it held that the intervening creditors had the affirmative of that issue, and that the burden of proof was upon them. A debtor cannot virtually prefer a creditor by making no defence to an attachment when no grounds for attachment exist. *Drake* on Att., 7th Ed., Sec. 275, p. 263; 1 *Wade* on Att., Sec. 286, p. 547; *Waples* on Att., 2d Ed., Sec. 792; *Schilling v. Deane*, 36 Ill. App. 513; *Farwell v. Jenkins*, 18 Ill. App. 493; *Walker v. Roberts*, 4 Rich. L. (S. C.) 561; *Henderson v. Thornton*, 37 Miss. 448; *Davis v. Eppinger*, 18 Cal. 378.

2. The burden is on the plaintiff to establish the grounds of his attachment. Wade on Att., Sec. 281; Waples on Att., 2d Ed., Sec. 707, 708; Shinn on Att., Sec. 116, p. 174. The intervening creditors stand in the shoes of the defendant, and as against them as well as the defendant, the plaintiff must make out his case. *Speyer v. Ihmels*, 21 Cal. 280; *Bamberger v. Halberg*, 78 Ky. 376; 1 Shinn on Att., Sec. 437; *Dry Goods Co. v. Dry Goods Co.*, 37 S. W. Rep. 103.

It is true that the traverse of the intervening creditors in this case was directed to the plaintiff's cause of action rather than the grounds of attachment, but there is no distinction between the two cases. *Bateman v. Ramsay*, 74 Tex. 589.

In the most recent work on attachments the subject "Intervention" is fully and carefully treated, and it is there said that when the intervenor sets up ownership of the property attached the burden is on him to sustain his claim, but when the right to sue out the attachment is denied by the intervenor, the burden devolves upon the plaintiff to establish the grounds of his attachment. 1 Shinn on Attachment, Sec. 437 (1896,) and cases cited. This seems to be the rule, though the intervenors affirmatively allege fraud and collusion on the part of the plaintiff and the defendant. *Speyer v. Ihmels*, 21 Cal. 280; *Bamberger v. Halberg*, 78 Ky. 376; *Posey v. Underwood*, 1 Hill (S. C.), 262.

The only reason assigned by the plaintiff in the court below for requiring the intervening creditors in this case to prove a negative, was that the averments of the traversing affidavit filed by the intervenors, were made upon information and belief and not upon personal knowledge. The reason given is utterly fallacious. It is true that parties will not in some cases be put upon their defence, nor certain defences allowed, unless an affidavit upon personal knowledge is made. *Newman v. Hexter*, MacA. & M. 88. But the party having once been admitted to prosecute or defend,

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the rule of evidence which imposes the burden of proof upon him who alleges the affirmative cannot be affected by the fact that the pleadings are or are not under oath. If it would be proper to require an affidavit upon personal knowledge, it should be required as a condition precedent to the intervention. It is obvious that such a requirement would put an end to interventions in cases of this kind, for the most that the intervening creditor or his agent can do, is to make affidavit to a negation upon information and belief. No one but the fraudulent and collusive defendant can make oath upon personal knowledge that he is not fraudulently disposing, nor about to dispose, of his goods. The whole object in permitting the intervention is to prevent collusion by requiring the plaintiff to prove that grounds for his attachment did, in fact, exist.

The court below appears to have proceeded upon the theory that the intervening creditors must be treated as plaintiffs in an independent proceeding, just as if they were complainants in the equity court attacking a fraudulent transfer by the defendants, and must be required to make out a complete case of fraud and collusion between the plaintiff and defendants, before the plaintiff is called upon to deny anything. There is absolutely no authority for any such position. The intervenors are admitted to defend in the name of the mute defendant. *Buckman v. Buckman*, 4 N. H. 319; *Clough v. Curtis*, 62 N. H. 409; *U. S. Express Co. v. Lucas*, 36 Ind. 361; *Speyer v. Ihmels*, 21 Cal. 280.

3. The jurisdiction of the court below to allow the intervention of the appellants is fully sustained by the authorities. *Drake on Att.*, 7th Ed., Secs. 273, 276, 278; 1 *Wade on Att.*, Sec. 54; *Waples on Att.*, 2d Ed., Secs. 796, 798; *Shinn on Att.*, Ch. "Intervention;" *Clough v. Curtis*, 62 N. H. 409; *Nenny v. Schuleter*, 62 Tex. 327; *Zadick v. Schafer*, 77 Tex. 501; *Schilling v. Deane*, 36 Ill. App. 513; *Walker v. Roberts*, 4 Rich. L. (S. C.) 571; *Moore v. Stege*, 93 Ky. 27. The only restrictions upon the right to intervene are that the inter-

venors must have an interest in the attached property by way of lien or otherwise; and that they cannot take advantage of mere technical defects and irregularities in the first attachment.

In the District of Columbia the right of any person having an interest in the attached property to appear and make defence to the attachment, has been asserted by the courts in many cases. *Matthai v. Conway*, 2 App. D. C. 45; *Robinson v. Morrison*, 2 App. D. C. 105; *Reynolds v. Smith*, 18 D. C. 27; *Wallace v. Maroney*, 6 Mackay, 221; *United States v. Howgate*, 2 Mackey, 408.

It is true that the case at bar is the first, so far as the reports show, in which this right has been claimed by, or accorded to, a subsequent execution or attachment creditor; but the interest of a junior execution creditor arising from his lien is not distinguishable in principle from an interest accruing in any other way, and as much entitles him to intervene as if he claimed to be the owner of the property attached.

*Mr. Leon Tobriner* for the appellee:

1. Whilst the courts of this District have, in several instances, permitted parties claiming title to property alleged to have been wrongfully taken, to intervene in attachment suits, no case has ever arisen in this jurisdiction where an alleged judgment creditor asserting no lien has sought to avail himself of the remedy by intervention for the purpose of contesting the right of another creditor who has by attachment proceedings obtained priority. The mere fact that a party is a judgment creditor of a defendant in an attachment proceeding, in which personal property has been levied upon, does not entitle him to intervene in that action for the purpose of contesting the attachment. He must go further and show a valid lien upon the property; this is the rule in those jurisdictions where junior creditors are permitted to question the validity of prior attachments, and in this respect there is no distinction between judgment and

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attaching creditors. In all cases the attaching creditor is required to have a lien, and must at least aver that the attachment which he contests is prejudicial to his interests or rights. *Drake on Att.*, Sec. 275; *Waples on Att.*, Sec. 794; *Tira v. Smith*, 93 N. Y. 87, 90; *Hodgman v. Barker*, 128 N. Y. 601; *Scharff v. Chaffee*, 68 Miss. 641; *Everitt v. Manufacturing Co.*, 11 N. Y. Supp. 508; *Horn v. Water Co.*, 13 Cal. 62; *Noyes v. Brown*, 75 Tex. 458, 461; *Nenny v. Schuller*, 62 Tex. 327; *Adler v. Anderson*, 42 Mo. App. 189, 200.

The reason for requiring an intervenor in a case of this character to show a lien must be apparent. If he has no lien he is not prejudiced by the attachment proceeding. He is not entitled to contest simply for the sake of a contest. Without a lien he is a mere stranger, an interloper. There is no averment either in the petition or proof that the debtors had no other property than that attached, or that this property was insufficient to satisfy appellant's demand if subjected to a levy under their execution. *Non constat*, that there was other property:—*non constat* that the property attached would have been sufficient to satisfy all claims levied against it. Fraud unattended with injury can not be made the basis of an action either at law or equity.

2. An execution on judgment of a justice of the peace is not a lien on personalty, whilst in the hands of a constable; it only becomes such by levy. 12 Ency. L. & Eq. 478; *Murfee Justice's Practice*, Sec. 638. This has been the uniform opinion of the bar of this District for many years, and accepted as good law; it has never been questioned in this jurisdiction. See also *Harlan v. Mining Co.*, 10 Nev. 92.

In *Harlan v. Mining Co.*, 10 Nevada, 92, where the statute permitting intervention was similar to that of California, it is held that where the petition for intervention does not state facts sufficient for a recovery or relief for the intervenor, such defect, on the appeal of the intervenor, can be considered and the petition be treated the same as a complaint, which fails to state facts sufficient to constitute a cause of action.

3. In this case the appellants intervened under the allegations set forth in their petition purporting to be supported by the affidavit of their attorney. This affidavit amounted to no verification whatever, as upon an examination it will be seen that had every allegation in the petition been absolutely false no charge of perjury could have been sustained against the affiant, who practically swore to nothing. The petition simply amounted to an averment, unsupported by oath or any proof.

This was not the ordinary case of a defendant in attachment filing an affidavit traversing the plaintiff's affidavits and presenting the issue whether there was just grounds for the attachment, as provided by the statute. The appellants sought intervention on the ground of collusion and fraud; this allegation imposed upon them the burden of proving such collusion. It can not be contended that having been permitted to intervene upon the allegation of this ground, they would be permitted to abandon it, and call upon the plaintiff in the first instance to make proof of his ground for attachment. Fraud was the gravamen of their charge, and the court had a perfect right, in the exercise of its discretion, to direct with whom under the condition of the pleadings the onus of proof should lie, and what evidence should first be adduced, and by whom. *Robinson v. Morrison*, 2 App. D. C. 105, 115.

4. The court below committed no error in dismissing the petition of intervention. The intervenors had no lien upon the property attached, and they utterly failed to prove the allegations in the petition as to fraud and collusion. *Lewis v. Harwood*, 28 Minn. 428.

Mr. Justice SHEPARD delivered the opinion of the Court :

1. Before considering the case on the errors assigned, certain preliminary questions raised by the appellee in support of the judgment must be disposed of. As we have seen, there was no objection taken to the leave to file the petition

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of intervention, and no demurrer thereto when filed. Now, for the first time, it is urged that the court had no power to permit or to entertain it.

Since a very early day, in Maryland, the right of one claiming title to, or an interest in, property that has been attached, to intervene in the cause and controvert the truth of the grounds of the attachment stated in the plaintiff's affidavit, has been firmly established. *Campbell v. Morris*, 3 H. & McH. 552; *Ranahan v. O'Neale*, 3 G. & J. 298, 301; *Stone v. Magruder*, 10 G. & J. 383, 386; *Carson v. White*, 6 Gill, 17, 26; *Clarke v. Meixsell*, 29 Md. 221, 227. The same practice has obtained in the Supreme Court of the District of Columbia, and has been repeatedly sanctioned by that court in General Term. *United States v. Howgate*, 2 Mackey, 408; *Wallace v. Maroney*, 6 Mack. 221, 223; *Reynolds v. Smith*, 18 D. C. 27. Twice since the organization of this court the right of intervention has passed unquestioned. *Robinson v. Morrison*, 2 App. D. C. 105, 120; *Matthai v. Conway*, 2 App. D. C. 45, 50. The point must now be regarded as settled.

It is true the intervenors in this case do not claim ownership of the property, but a lien thereon and superior right to subject it to the satisfaction of their judgment. We see no difference in principle, however, between the right of intervention of one who claims title to the property, and of one who asserts an interest through a lien by contract, or by operation of law under an execution or attachment. *Clarke v. Meixsell*, 29 Md. 221; *Buckman v. Buckman*, 4 N. H. 319; *Clough v. Curtis*, 62 N. H. 409; *Jacobs v. Hogan*, 85 N. Y. 243; *Drake on Attachments*, Secs. 273, 275.

2. It is further urged that the petition of intervention is fatally defective in that it does not sufficiently appear from its allegations that the defendants in attachment had no other property upon which intervenors might have levied their execution and obtained complete satisfaction. Had this objection been taken by demurrer and sustained, there would be no error in the dismissal of the petition. But how-

ever important the fact, it was not jurisdictional; and whilst its omission was a grave defect in the petition, it was one that could, and doubtless would, have been supplied by immediate amendment had attention been directed to it at the proper time. It would be unjust now to hold, regardless of any error that may have been committed on the trial, that the judgment must nevertheless stand because of that defect in the petition.

3. The next and last point offered in support of the judgment would be decisive if well taken. The right to intervene is founded on an interest in the attached property acquired by the issue, and delivery to an officer, of the execution. If there be no such interest the defect is incurable. The necessity of some interest in the property, by way of claim of title or lien, or superior right to satisfaction, is essential to the right of intervention. *Phillips v. Both*, 58 Iowa, 499, 502; *Scharff v. Chaffee*, 68 Miss. 641; *Tira v. Smith*, 93 N. Y. 87.

At common law, the lien of a *fi. fa.* dated from its *teste*. Freeman, Executions, Sec. 135. This was modified by the act of 29 Charles 2, Sec. 16, so as to make the lien (as against all but innocent purchasers for value, perhaps) date from the delivery of the writ to the proper officer for execution. That statute was in force in Maryland at the time of the cession of the territory of the District, and has not since been repealed. Comp. Stat. D. C., p. 222, Sec. 1; *Arnott v. Cooper*, 1 H. & J. 471; *Selby v. Magruder*, 6 H. & J. 454; *Furlong v. Edwards*, 3 Md. 99, 113.

Founded in the fact that courts of justices of the peace are not considered courts of record, there is some question whether executions therefrom bind the property under the act aforesaid from the time of delivery to the officer, or from the time of actual levy only. 12 Am. & Eng. Encyc. of Law, 478; Freeman, Executions, Sec. 199.

In the view that we have taken of the case, that question is of no practical importance and need not be decided. There

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was no way in which the constable could have made an actual levy of intervener's writ upon the property. It had been seized by the marshal under the attachment, and was thereby put beyond the interference of any court or officer. *Hagan v. Lucas*, 10 Pet. 400; *Covell v. Heymen*, 111 U.S. 176. Whilst the writ might have been delivered to the marshal for execution (R. S. D. C., Sec. 912), the constable was the regular executive officer of the justice's court, charged by law with the execution of its process. R. S. D. C., Sec. 1038. Had the writ been delivered to the marshal himself, he could not have resealed the property and held it thereunder. There is no express provision of law requiring or authorizing him to endorse a subsequent execution as levied upon the property subject to the attachment, though he might probably be permitted to do so, in order to fix a right thereunder to claim the surplus after the discharge of the prior writ, or to contest its priority or validity.

The statute of Charles II aforesaid requires the officer to endorse upon each *fi. fa.* the date of its receipt, for the apparent purpose of determining its priority; but provides nothing further to be done in order to fix and retain its lien upon property that may have been seized under a prior writ.

For the purposes of this case, at least, the action taken by the intervenors should be regarded as the equivalent of an actual levy. Everything was done that could be lawfully done. The judgment was obtained and the writ issued and delivered to the regular officer of the court for execution. That officer could not take the property into his possession. All that he could do was to hold the writ, notify the marshal, perhaps, and remain in position to seize the property should the attachment be quashed, or its remainder, should a part only be required to discharge the prior writ. This we think was sufficient to authorize the judgment creditors to intervene and controvert the grounds of the attachment that bars the way to the enforcement of their execution.

4. This brings us to the consideration of the error assigned

by the appellant. Did the court err in requiring the intervenors to assume the burden of proving that the grounds of the attachment were not true? The statute authorizes the issuance of an attachment at the commencement, or during the pendency, of a suit, upon an affidavit of the plaintiff alleging the existence of certain grounds, and "supported by the testimony of one or more witnesses." R. S. D. C., Sec. 782.

Upon compliance with this section the attachment is issued by the clerk as a matter of course. As has been said by this court: "The duty of the clerk is ministerial. He makes no inquiry into the truth or falsity of any facts stated in the affidavits. If they conform generally to the statute, and the undertaking is offered with satisfactory surety, he issues the writ at once." *Weiler v. Chock*, 4 App. D. C. 330.

The next section provides: "If the defendant, his agent or attorney, shall file an affidavit traversing the plaintiff's affidavit, the court shall determine whether the facts set forth in the plaintiff's affidavit are true, and whether there was just ground for issuing the writ of attachment; and if the facts do not sustain the affidavit, the court shall quash the writ of attachment or garnishment; and this issue may be tried by a judge at chambers on three days' notice." R. S. D. C., Sec. 783.

When the affidavit is traversed, the issue is to be tried, at the demand of either party, upon oral evidence. *Robinson v. Morrison*, 2 App. D. C. 105, 116. We think that by the natural and proper construction of the statute the burden, on that trial, is cast upon the plaintiff to prove the existence of the facts which justify the attachment. It does not say that the defendant shall disprove the facts alleged by the plaintiff, but that the court shall determine whether the facts alleged by the plaintiff are true, and shall quash his writ "if the facts do not sustain the affidavit."

The writ of attachment is a harsh and severe process, though necessary in many cases for the proper protection of

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creditors. The right to have it is a privilege granted upon the alleged existence of certain facts. The affidavits required are *prima facie* sufficient to authorize the clerk to perform the ministerial act of its issuance; but this *prima facie* case is overthrown by the traverse under oath, and if the plaintiff offers no evidence to support the truth of his averments, his attachment will and ought to fail. The affirmative is upon the plaintiff, and to require the defendant to take the burden of establishing a negative is to reverse the natural order of pleading and proof. There is certainly no hardship in imposing upon the former the burden of maintaining the advantage obtained by his writ. Having knowledge of the facts sufficient to justify him in making affidavit of their existence, he ought to be prepared with some evidence to prove his charges. Where the intent to defraud is charged in general terms, the defendant often might not know how and with what evidence to prepare to disprove the charge until informed by plaintiff's evidence of the specific acts from which the inference had been drawn.

The conclusion that we have reached, after much consideration, is, in our opinion, not only sound in principle, but supported by many well considered decisions, which, when examined, will be seen, in so far as they may be influenced by statute at all, to be founded on provisions substantially like our own. *Wright v. Rambo*, 21 Gratt. 158, 162; *Oliver v. Wilson*, 29 Ga. 642, 645; *Coston v. Page*, 9 Ohio St. 397; *Talbot v. Pierce*, 14 B. Mon. 158, 164; *Hawkins v. Albright*, 70 Ill. 87; *Jones v. Swank*, 51 Minn. 285; *Ellison v. Tallon*, 2 Neb. 14; *Citizens' State Bank v. Baird*, 42 Neb. 219; *Wynn v. Wilmarth*, 1 S. Dak. 172; *Bamberger v. Halberg*, 78 Ky. 376.

The effect of the intervention was to make the intervenors virtually defendants to the writ of attachment. By virtue of their acquired interest in the property, they had acquired the same right that defendants had to traverse the affidavit for attachment. If that attachment was falsely

and wrongfully sued out, and defendants failed or refused to make defense to it, the intervenors had the right to do so in order to remove it as an impediment to their better right of seizure and sale in satisfaction of their execution. To this extent they were entitled to stand in the shoes of the defendants. *Campbell v. Morris*, 3 H. & McH. 553; *Clarke v. Meixsell*, 29 Md. 221. This situation illustrates, also, the reasonableness of the rule that imposes the burden of proof upon the plaintiffs, to sustain the attachment. If it were upon the intervenors, and especially in a case where there might be collusion between the plaintiff and defendant, their proceeding would rarely be productive of results.

It follows that the court erred in imposing the burden of proof upon the intervenors, and that the judgment must be reversed.

5. In respect of the charge of collusion, however, between the parties, the rule is different. That issue is separable from the other, and upon it the intervenors have the affirmative and must assume the burden of proof. If the facts warranting the attachment should not be proved, it would be quashed without regard to the question of collusion; for no plaintiff should have the benefit of an advantage obtained by false or reckless swearing, even if there has been no collusion, and the defendant simply remains indifferent to the charges against him. Even if proof should be made of conduct on the part of the defendants which, under ordinary circumstances, would justify attachment, the writ ought nevertheless to be quashed upon proof of fraudulent collusion between the plaintiff and defendant. If the facts were such as to bring the case within the provisions of the general assignment act (27 Stat. 474), such an attempt to give a preference would be as much within the prohibition of the statute as an attempt to accomplish the same end by private contract. Indeed, an attempt to use the process of the court for an unlawful purpose would be far more reprehensible.

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For the error pointed out above, the judgment will be reversed, with costs to the appellants, and the cause remanded with direction to set aside the verdict and grant a new trial. It is so ordered. *Reversed and remanded.*

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IN RE APPLICATION OF BARRATT.

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PATENTS; APPELLATE PRACTICE; PATENTABLE NOVELTY.

1. When all the tribunals of the Patent Office have decided adversely to an applicant for a patent, the concurrent decision will not be reversed except in a very clear case.
2. The record in a case appealed from the Commissioner of Patents upon his refusal to grant a patent for an alleged improvement in the construction of needle cylinders for knitting machines, examined and *held* insufficient to show that the appellant's device showed patentable novelty, although apparently a substantial and useful improvement.

No. 68. Patent Appeals. Submitted May 10, 1897. Decided May 25, 1897.

HEARING on an appeal from a decision of the Commissioner of Patents refusing a patent. *Affirmed.*

*Mr. Anthony Pollok* and *Mr. Philip Mauro* for the appellant.

*Mr. W. A. Megrath* for the Commissioner of Patents.

Mr. Justice MORRIS delivered the opinion of the Court:

This is an appeal from the decision of the Commissioner of Patents rejecting the application of the appellant, William T. Barratt, for a patent for an alleged improvement by him in the construction of needle-cylinders for knitting-machines.

The invention which the applicant claims to have made, and which he desires to secure by letters patent, is described by him in his application and by the several tribunals of

the Patent Office, in their decisions in two several claims, as follows:

"1. In a knitting-machine the combination of upper and lower revoluble cylinders supported to have a space between their opposing edges, needles carried by said cylinders to cross each other on a line midway of the space between the cylinders, and a rim or flange depending from the upper cylinder within the upper edge of the lower cylinder and below the line on which the needles cross, substantially as and for the purpose specified.

"2. In a knitting-machine, the combination of upper and lower revoluble cylinders supported to have a space between their opposing edges, the upper cylinder having a recess formed in the inner portion of its lower edge, needles carried by said cylinders to cross each other on a line midway of the space between the cylinders, and a rim or flange fitted into the recess in the upper cylinder and extending downwardly within the upper edge of the lower cylinder and below the line on which the needles cross, substantially as and for the purpose set forth."

These counts differ only in this, that the first claim refers, broadly, to a rim or flange depending from the upper cylinder that has been mentioned, while the second claim is for a rim or flange fitted into a recess in this upper cylinder, and the alleged invention is in fact an improvement upon a previous invention for which letters patent were granted on July 8, 1891, to one William H. Carr. Reference was also made in the Patent Office to the invention of one Eugene Vermilyea in the same field of operation, for which letters patent were granted to him on June 8, 1889, and from which it is alleged that the present applicant took one element, which he applied to the invention of Carr, and which constituted his improvement upon the latter.

All the tribunals of the Patent Office have decided adversely to the applicant, on the ground that his improvement, while conceded to be a substantial and useful improvement,

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is the result merely of mechanical ingenuity, and not the product of the inventive faculty, and for that reason is wanting in patentable novelty. On this issue he has appealed to this court.

There is no broad line of demarkation between the exercise of mechanical ingenuity and that of the inventive faculty, and it is not always easy to tell where the one begins and the other ends. In the meager record of the case before us that difficulty is enhanced by the fact that very much is left for us to conjecture as to the condition of the art to which this alleged invention appertains at the time when the improvement was devised, and the diagrams introduced into the record do not remove the difficulty. Without entering into details, we think that, while the appellant's device commends itself to our favorable consideration and may upon a judicial investigation, wherein proof is more fully supplied and the condition of the art more clearly set forth, be found entitled to the merit of patentable novelty, we should hesitate in this *ex parte* proceeding to reverse the concurrent decisions of all the tribunals of the Patent Office, which we think should not be done except in a very clear case. The present is not a clear case. At most, there is but a suspicion that the appellant's device may rise to the dignity of invention. Upon full proof in a court of equity, that suspicion may possibly become certainty. We have not now the data before us that would warrant us in so regarding it in this proceeding. The assumptions of counsel in their briefs and in their oral arguments are not in harmony as to the condition of the art; and it is not even clear that there is entire agreement as to what specifically constitutes the appellant's claim of invention in view of the condition of the art.

In view of these circumstances, leaving the appellant to his bill in equity, if he desires to have recourse thereto, we must affirm the decision of the Commissioner of Patents in the premises.

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The clerk will certify this opinion and the proceeding in the cause to the Commissioner of Patents, to be entered of record in his office, according to law. *Affirmed.*

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THE UNITED STATES OF AMERICA, EX REL.  
DE YTURBIDE,

v.

THE METROPOLITAN CLUB OF THE CITY OF  
WASHINGTON.

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PRACTICE; VERDICT; PRAYERS FOR INSTRUCTION; CORPORATIONS;  
BY-LAWS; AMOTION.

1. Under the statute of 9 Anne, Ch. 20, Sec. 2, which is in force in this District, the verdict of the jury is conclusive as to all matters of fact involved in a trial.
2. Prayers for instruction to the jury which conclude with a direction to find a verdict for the party offering them, must include every fact and circumstance in evidence that might justify an adverse conclusion, and make it clear that upon the evidence thus presented the adverse party has no right to a verdict in his favor.
3. A social club incorporated under the general incorporation laws of this District has the power after trial to expel one of its members for an offence against its by-laws, and if the trial is regularly conducted and the judgment of expulsion arrived at in good faith, there is no power or jurisdiction in the courts to reverse or vacate that judgment.
4. When a by-law of such a club subjects a member to expulsion for conduct unbecoming a gentleman, upon a two-thirds vote of the board of governors, it is a question which can only be determined by the corporate authorities whether the conduct of a member in accusing the daughter of a fellow-member, within the club and to members thereof, of writing anonymous letters, is a violation of the by-law.

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## Statement of the Case.

5. Until the determination of the corporate authorities in such a case is successfully impeached, it will be presumed to have been fairly and *bona fide* made.

No. 652. Submitted April 6, 1897. Decided June 9, 1897.

HEARING on an appeal by the relator from a judgment on a verdict upon a petition for a writ of *mandamus*. *Affirmed*.

## STATEMENT OF THE CASE.

This was an application for a *mandamus* by the appellant, Agustin de Yturbide, as relator, against the Metropolitan Club of the City of Washington, to compel the club to reinstate the relator to membership of the club, from which he had been expelled.

To the rule to show cause the appellee answered, and the answer was traversed by the relator, and issue was joined. The case was tried before a jury, as provided by the statute, and a verdict was rendered in favor of the respondent. A bill of exception was taken to certain rulings of the court made in the course of the trial, and the case is brought here for review of those rulings.

At the trial the following prayers for instruction to the jury were offered in behalf of the relator, all of which were refused, and exception duly noted:

1. If the jury believe from the evidence that there was no specification of charges in the summons to the board sent to the relator on April 23d, 1896, their verdict should be for the relator.

2. If the jury believe from the evidence that the relator did not have a full, fair, and impartial hearing before the board of governors at the meeting before which he appeared, then their verdict should be for the relator.

3. If the jury believe from the evidence that the relator was forced to leave the board room on April 25th, 1896, before he had finished his justification or defense, then their verdict should be for the relator.

4. If the jury believe from the evidence that the hearing

## Statement of the Case.

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of the relator before the board of governors on the 25th day of April, 1896, was not held by the board with all the solemnity of a trial, then their verdict should be for the relator.

5. If the hearing of the relator before the board of governors on the 25th day of April was not held by the board with all the formality of a trial, then their verdict should be for the relator.

6. If the jury believe from the evidence that the relator, owing to the lack of specifications in his summons to the board, was not afforded sufficient opportunity at the hearing to defend himself fully and fairly, by summoning witnesses or otherwise, then their verdict should be for the relator.

7. If the jury believe from the evidence that the relator was led to believe by the board of governors at the hearing that he would be summoned again before the board to complete his defense, but was not so summoned by them and had no further opportunity to defend himself, then their verdict should be for the relator.

8. If the jury believe from the evidence that the relator, at the hearing of the board on April 25th, asked to be confronted with his accusers, and that such request was refused by the board, then their verdict should be for the relator.

9. If the jury believe from the evidence that the relator was also charged with conduct on previous occasions bringing great discredit on the club, as set out by the resolutions of April 25th, and if the jury believe from the evidence that the relator had no opportunity to defend himself against such charges, then their verdict should be for the relator.

10. If the jury believe from the evidence that the relator was not summoned before the meeting of May 2d, at which meeting he was expelled, and was not present at said meeting or notified of the same, then their verdict should be for the relator.

The further material facts are stated in the opinion of the court.—REPORTER.

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Argument of Counsel.

*Mr. Walter V. R. Berry* for the appellant:

1. The law is well settled that in every proceeding before a club, having for its object the expulsion of a member, the latter is entitled to be fairly and fully heard and to have full opportunity of explaining his conduct. *Mandamus* is the proper remedy to restore a member who has been wrongfully expelled. 1 Morawetz on Corporations, Sec. 277; Angel and Ames on Corporations, p. 469; Wilcock on Corporations, Sec. 700; 1 Spelling on Private Corp., Sec. 528; Merrill on *Mandamus*, p. 207; *Hutchinson v. Lawrence*, 67 How. Pr. (N. Y.), 38; *Plank Road v. Hixon*, 5 Ind. 169; *Rex v. Liverpool*, 2 Burr. 734; *Gebhard v. Club*, 21 Abbott's New Cases, p. 250; *Elliott v. Cotton Ex.*, 8 Hun, 216, 220; *Delacy v. Neuse*, 1 Hawks (N. C.), 281; *People v. Aid So.*, 22 Mich. 86, 90; *Erd v. Bavarian Assn.*, 67 Mich. 233, 236; *Newman v. Sailors' Snug Harbor*, 5 Abb. Pr. (N. S.), p. 123; *Com. v. Pa. Ben. Ins.*, 2 Ser. & Rawle, 141; Field on Corp., Sec. 65; *People v. Medical Society*, 24 Barb. 574; *Schmitt v. St. Franciscus So.*, 24 How. Pr. 216, 221; *Graham v. Chamber of Commerce*, 22 Wis. 68; *Medical Society v. Weatherly*, 75 Ala., p. 248; *Bartlett v. County of Erie*, 32 N. Y. 187; *Exeter v. Glide*, 4 Mod. 33, 37; *Dean v. Bennett*, Law Rep., 6 Ch. App. Cases, 489, 493; *Reg. v. Bailiff of Ipswich*, 2 Salk. 434-5; *Downing v. Society*, 10 Daly, 264; *Reg. v. Arch of Canterbury*, 1 Ellis & Ellis, 545, 560; *Rex v. Univ. of Cambridge*, 2 Lord Raym. 1334; *Innes v. Wylie*, 1 Car. & K. 257; *Blisset v. Daniel*, 10 Hare, 493; *Queen v. Saddler's Co.*, 10 H. L. Cases, 438, 456, 471; *Willis v. Childe*, 13 Beavans, 127, 130-2; *Loubat v. Union Club*, 40 Hun, 550.

From the principles of law illustrated in the cases cited above it is manifest that, before a member can be expelled from a club, he is entitled to be fully and fairly heard and given an opportunity to exculpate himself, as far as may be done, either in vindication or in palliation of the alleged misconduct; that no matter how desperate his case may ap-

## Argument of Counsel.

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pear, the board can not forestall him by saying he can allege nothing, but must hear the whole case before deciding it; that the materials on which judgment is formed must be accurately ascertained, and not upon hurried and incomplete examination; that the accused is entitled to claim that nothing important shall be disregarded to his prejudice. Wherever one looks in the range of law one finds that courts are loath to have parties deprived of their rights without full opportunity for defence; furthermore, that it would be doing monstrous injury to listen to half of what a man has to say, and then close his mouth to what may be the vital part of his statement. 1 Ev. Pothier, Sec. 799; *Randle v. Blackburn*, 5 Taunt. 245, 246; *Thompson v. Austen*, 2 Dowl-  
ing & Ryl, 358; 1 Greenleaf on Evidence, Sec. 218.

It is said in the case of *Rex v. Sutton*, 10 Mod. 76, that "a removal being an act of an odious nature, all acts concerning it must receive a strict interpretation." If interpretation, not strict, but of the most favorable kind be given to the acts of the board of governors, it is apparent from their own testimony that from the beginning to the end the relator was deprived of his right to a fair hearing. He was, in fact, prejudged.

2. The great argument of the counsel below was that the relator had "admitted the charge," and that, therefore, the board had had everything before them on which to base a judgment. The relator never did admit the charge, but denied that he had been guilty of conduct unbecoming a gentleman, or that he had made a scandalous charge, or that he had accused the person of writing anonymous letters, but stated he had simply asserted the fact "when it was incumbent upon him to do so," and when he attempted to explain his conduct in regard thereto (as he could have done with honor to himself), he was interrupted, stopped, and shown the door.

3. By this act of expulsion the board disfranchised the relator and deprived him of valuable property rights, for

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## Argument of Counsel.

this club is a corporation possessing estate, real and personal, to the value probably of two hundred thousand dollars. There is an important distinction between cases of simple expulsion from the enjoyment of merely personal privileges of membership and those where such expulsion has the effect of forfeiting property interests. In the latter class of cases, courts will scrutinize the proceedings much more closely and more readily interfere to protect those interests and redress wrongs thereto. See *Spelling on Corp.*, Sec. 531, and *Evans v. Philadelphia Club*, 50 Pa. St. 113. This is obvious, for the rights of such membership can not depend upon an arbitrary edict born of caprice, passion, or prejudice on the part of governors.

By this act of expulsion, in violation of every principle of justice, the board not only disfranchised the relator and deprived him of these valuable property rights, but also practically ruined his reputation.

*Mr. Calderon Carlisle* and *Mr. William G. Johnson* for the appellee:

1. The power of the appellee to expel the appellant by proceedings in conformity with its by-laws would seem to be not open to question in view of his contract of membership. That contract, as shown by the by-laws under which he became a member, conferred no absolute right to remain a member under any and all circumstances, but was expressly conditional in its character. He became a member only upon condition of his "assent to the constitution and rules" and of "submission to the restrictions they enjoin, and to the penalties which they impose."

The position now assumed by the appellant is, that notwithstanding this conditional contract of membership under which he was admitted, he has an absolute and unconditional right to remain in the club, to ignore all the restrictions enjoined by its rules and to escape all the penalties which they impose. The law will not permit him to

maintain so extraordinary and unreasonable a position. On the contrary, in cases calling for the action of the courts, the adjudications have been against appellant's position, and the right of a club to expel a member by its own proceedings in accordance with by-laws to which he has given his express or implied assent has been upheld.

One of the essential incidents of a corporation is to make by-laws for the management of its business and the control of its members. 1 Bl. Com. 475, 476; 2 Kent's Com. 297. In addition to this general incidental power there is express statutory authority by Section 546 of the Revised Statutes of the United States relating to this District which in enumerating the powers of corporations created under the act, in terms says: "and may make by-laws." A by-law which enjoins decorous conduct on the part of its members and denounces conduct "unbecoming a gentleman" is, in the strictest sense, germane to "the promotion of social intercourse," and not only properly within the power to make by-laws, but essential to the purposes and even continued existence of the corporation.

The doctrine of Lord Mansfield, as announced in *King v. Richardson*, 1 Burr. 517, 524, is declared by Chancellor Kent, in his commentaries, to be the modern law of corporations, and he says: "The power of amotion or disfranchisement of a member for a reasonable cause is a power necessarily incident to every corporation." 2 Kent's Com. 297. This doctrine was affirmed by Ch. J. Tilghman in 1810. *Com. v. Ben. Soc.*, 2 Binn. 448, 449. See also, to the same effect, *State v. Med. Soc.*, 38 Ga. 627; *Thatcher v. Com. Soc.*, 18 Abb. Pr. R. 278; *Dickenson v. Chamber of Com.*, 29 Wisc. 45; *Gebhard v. Club*, 21 Abb. N. C. 248; *Baum v. Cotton Exch.*, Id. 253.

In *Manning v. San Antonio Club*, 63 Texas, 169, 171, the court points out the distinction as to social clubs, and holds that a party can not invoke the protection of the courts against his own agreement by which he has assented to the by-laws. The respondent had full legal authority to expel

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the relator. If considered as a member, by contract, by virtue of the express terms of that contract. If considered as a corporation, then under a valid by-law and an inherent and incidental power in the corporation by virtue of its corporate character.

2. The ground of the expulsion of the relator being the violation of a by-law made for the good government of the corporation, and being an act against his duty to the corporation, the respondent not only had the legal power to adjudge what constituted conduct unbecoming a gentleman, but it was the only tribunal which could exercise such a power. *King v. Richardson*, 1 Burr. 527; *Com. v. St. Patrick Ben. Soc.*, 2 Binn. 448; *Com. v. Union League Club*, 135 Pa. St. 301; *Dawkins v. Autrobus*, 17 Ch. D. 615; *Com. v. Pike Co. Ben. Soc.*, 8 W. & S. 247; *Benson v. Ben. Asso.*, 76 Texas, 562; *Hopkins v. Marquis of Exeter*, L. R. 5 Eq. 63; *Richardson v. Freemantle*, 24 L. T. 81; *Lambert v. Addison*, 46 L. T. 25.

This has been the uniform ruling of all courts. They do not assume to try questions which the corporations have the power to regulate by their by-laws, but merely to see that the by-law is valid and the proceedings under it in accordance with the by-laws, and that the party complaining had a fair opportunity to be heard.

3. The board of governors had an undoubted right to act upon the relator's plea of guilty without other evidence. Whether the relator did or did not admit his guilt in this case was submitted to the jury—not only left to them, but they were to judge whether under the evidence the charge was communicated to him and he understood it, and, understanding it, he admitted it. The jury found against him, and for the purposes of this case it must be held that he did understandingly admit the charge against him.

4. The burden being on the relator to show that he had not had a fair trial, the court could not assume, as matter of law, in the absence of any evidence as to what, if anything, the relator attempted or desired to present to the board, that

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he had the legal right to have it considered against his admission of guilt.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

The Metropolitan Club of the City of Washington was incorporated in 1882, under the general incorporation law for the District of Columbia, "for literary purposes, mutual improvement, and the promotion of social intercourse." By the law authorizing the incorporation, the incorporators were authorized "to make by-laws and elect officers and agents, and to take, receive, hold and convey real and personal estate necessary for the purposes of the society as stated in their certificate, and other real and personal property, the clear annual income from which shall not exceed in value \$25,000."

In the by-laws adopted, by Article IV, it is declared that "payment of the dues shall thereupon be deemed evidence of assent to the constitution and rules, as well as of submission to the restrictions they enjoin, and to the penalties which they impose. After payment of dues the membership shall in each case date from the day of election." And by Article V it is declared that, "Any member wilfully infringing the rules and regulations of the club, or *conducting himself in a manner unbecoming a gentleman, shall be subject to expulsion upon a vote of two-thirds of the members of the board of governors.*" This board of governors consisted of fifteen members.

In the bill of exception all the evidence *in extenso*, and the running debate of counsel in the progress of the trial, are set out in full; and the case is presented here, both in the brief and in the oral argument, as if this court was required to pass upon both the law and the facts of the case, wholly irrespective of the verdict of the jury. Whereas we can pass upon nothing except questions of law that were raised by the rulings of the court below and excepted to by

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the appellant. If there was evidence to be considered, and the case was properly submitted to the jury on the instructions of the court, we have nothing to do with the inferences deduced from the evidence, or as to the conclusions of fact.

The verdict of the jury must be taken as conclusive as to all matters of fact involved in the trial. This is what is contemplated by Stat. 9 Anne, Ch. 20, Sec. 2, in force in this District, and according to which this trial was had.

From the evidence set out in the bill of exception, it appears that the relator, Agustin de Yturbide, a citizen of the Republic of Mexico, was elected a member of the Metropolitan Club in January, 1887, and that he remained a member until the 2d of May, 1896. On this last mentioned day he was, by resolution of the board of governors, expelled from the association, and it is of that act that he complains.

It is shown that on the 23d of April, 1896, the following notification was given the relator, and which is admitted to have been received by him:

"MR. AGUSTIN DE YTURBIDE.

Dear Sir: By order of the board of governors, I hereby give you notice that serious charges are preferred against you by members of the Club of conduct unbecoming a gentleman, which will be heard by the board on Saturday, April 25, at 2 o'clock, P. M., when you are notified to be present, if you wish to be heard in respect thereto.

"Very respectfully,

"ARNOLD HAGUE, *Secretary.*"

The relator accordingly appeared before the board of governors on the 25th of April, as designated in the previous notice of the 23d of that month. Upon that occasion the relator was informed by the president of the board of governors of the nature of the charges made against him. He was informed in these terms: "Mr. Yturbide, you are charged with having made a scandalous charge against a lady, a daughter of a member of this club, within the club,

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and to members of the club;" and the president of the board, naming a daughter of a member of the club, asked the relator, "If he had not accused her of writing anonymous letters?" To which question the relator replied: "No, Mr. President, the word 'accuse' does not convey the idea. At rare times, when I have felt it incumbent upon me to do so, I have asserted that she did, and I am prepared to prove the fact. I ask to be confronted with my accusers."

This was at once an admission of the main fact of accusation, and it seems to have been so regarded and acted upon by the board of governors. But the relator desired to go into a full statement of all the circumstances of the case, and his own conclusion as to his justification, and the exoneration of himself from blame. This, he contended, and still contends, was a right that was denied him, and hence he was wronged in not being allowed to make his defence. Whether such right of defence was denied him, is the principal question involved in the case. He states that, "I was going to proceed with my justification, because I could not only have justified myself as to the charge, but I could have come out with honor in the matter of this anonymous letter affair, if I had only been heard. There was a great deal to say—in fact, there was everything to say—and I had said very little in the course of the few remarks I had been allowed to make." At that point, says the relator, he was directed to leave the room. The relator did leave the room, and shortly thereafter he received the following resolutions of the board of governors of the club:

"METROPOLITAN CLUB, April 25th, 1896.

"MR. AGUSTIN DE YTURBIDE.

"DEAR SIR: I beg to inform you that at a meeting of the board of governors, held Saturday, April 25th, the following resolutions were adopted:

"Whereas, Mr. Agustin de Yturbide has made a scandalous charge against the daughter of a member of the club,

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within the precincts of the club, and to members of the club;

*"Resolved, That, in the opinion of the board, he has been guilty of conduct unbecoming a gentleman; and*

*"Whereas, Mr. Yturbide, by his conduct on previous occasions, has brought great discredit on the club; be it*

*"Resolved, That, in the opinion of the board, he is no longer a desirable member of the club.*

*"Resolved, That Mr. Yturbide be furnished with a copy of these resolutions.*

*"Very respectfully,*

*"ARNOLD HAGUE, Secretary."*

A copy of these resolutions was furnished the relator, but he utterly ignored them, and made no response thereto whatever. He says they called for no answer, and their contents were such as he considered unworthy of an answer from a gentleman. He says he was advised by a lawyer, and by many members of the club, to take no notice of them. These resolutions, as will be observed, were not resolutions of expulsion, but were simply declaratory of a desire on the part of the board of governors, that the club should be relieved of the membership of the relator, for the causes stated in the resolutions.

No attention having been given to these resolutions by the relator, the board of governors of the club, on the 2d of May, 1896, passed, and caused a copy thereof to be delivered to the relator, the following preamble and resolution:

*"Whereas a copy of the resolutions passed at a meeting of the board of governors, held on Saturday, April the 25th, in the case of Agustin de Yturbide, was delivered to him on the same day, since which time he has made no response thereto; therefore,*

*"Be it resolved, That in accordance with the by-law of the club, said Yturbide be, and he is hereby, expelled from the club for conducting himself in a manner unbecoming a gentleman."*

The relator himself, and several of the members of the board of governors, were examined at the trial as witnesses, and all gave their versions and recollections of what occurred upon the occasion when the relator was before the board on the 25th of April. The relator insists that he was not allowed, upon that occasion, a full and fair hearing for the vindication of himself; while on the part of the respondent, it is insisted that, the relator having distinctly admitted the fact that he had asserted in the club to members thereof that a daughter of a member of the club had been guilty of writing anonymous letters, there was no necessity for further inquiry, and that such conduct did not admit of any just excuse or palliation; and hence, after making the admission, the relator was refused a further hearing upon the subject.

It is somewhat remarkable, considering the nature of the case, and the fact of the admission made by him, that the relator has not stated, either in his petition for *mandamus*, or in his testimony, what the circumstances were that would justify his conduct, and acquit him with honor, as he asserts would have been the case, if he had been fully heard by the board of governors. The exculpatory or extenuating circumstances should have been stated, that the court or jury might have determined what effect they should have had upon the minds of the board of governors. It is not shown in any manner, whether the facts or circumstances that he was prevented from stating to the board of governors, were at all pertinent or material to his defence. To assume that they were so, could only be founded in mere conjecture.

At the close of the evidence on both sides, the relator moved the court for a direction to the jury that their verdict should be for the relator; but that request was refused and an exception was noted.

The court was clearly right in refusing this request. By that prayer, the relator was required to and did concede the truth of all the evidence against him, and to his right to relief, and all deductions from the evidence that could be

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reasonably made, including the fact of good faith on the part of the board of governors, in arriving at their conclusion. With this concession made, the court could not have ruled otherwise than it did.

The relator, upon the refusal of the prayer for an instruction for a verdict in his favor, then offered ten prayers for instruction to the jury, some upon matters of fact, and others involving necessarily questions of law. All of these prayers concluded with a direction to find for the relator, if the fact referred to, and made the basis of the prayer, was found as the prayer assumed it might be found.

The court refused all of these prayers, and we think rightly so, as none of them contained an hypothesis, *as matter of fact*, that embraced the whole case, and excluded all adverse conclusions from the whole evidence. Most of them are based upon segregated facts, and are of an abstract form, while others proposed to submit to the jury propositions that necessarily involve the matters of law that control the whole case. These prayers will be inserted in the preliminary statement of the case by the Reporter; and we shall not prolong this opinion by incorporating them here. Before an instruction can be granted that concludes with a direction to find the verdict for the party offering the prayer, it must be clear to the court that such prayer includes, and requires the jury to consider, every fact and circumstance in evidence that might justify an adverse conclusion; and that, upon the whole evidence thus presented, the adverse party has no right to the verdict in his favor. Prayers that conclude to the right of the plaintiff to recover, or against his right to recover, must not be of an abstract form, or founded only on part of the evidence, but must be in a concrete form, and give full force and effect to every part of the evidence that is material, and may properly affect the result, whether produced by one side or the other. This principle was not observed in the formulation of the prayers offered by the relator.

The relator excepted to the granting of an instruction at the instance of the respondent, and also to certain parts of the court's charge to the jury; and supposed errors in respect to these rulings are assigned. And whether there be error in these rulings we must inquire.

There is no longer any question of the right of a corporation, such as the respondent in this case, to make by-laws, even in the absence of express statutory power, and to exercise the power of amotion, as incident to the corporation. This has been regarded as the settled law since the case of *Lord Bruce*, 2 Strange, 819, and the subsequent exposition of the whole doctrine in the case of *Rex v. Richardson*, 1 Burr. 517, 539, by Lord Mansfield, speaking for the Court of King's Bench, in 1758. In this last mentioned case, after reviewing the former decisions and the previous doctrine upon the subject, and showing that the older cases had maintained a doctrine that had been modified by the more recent cases, the Lord Chief Justice said: "We all think this modern opinion is right. It is *necessary* to the good order and government of corporate bodies, that there should be such a power (that of amotion), as much as the power to make by-laws. Lord Coke says (*Bagg's Case*, 11 Co. 98a), 'there is a tacit condition annexed to the franchise which, if he breaks, he may be disfranchised. But where the offense is merely against his duty as a corporator, he can only be tried for it by the corporation. Unless the power is *incident*, franchises or offices might be forfeited for offences, and yet there would be no means to carry the law into execution. Suppose a by-law made to give power of amotion for just cause, such by-law would be good. If so, a corporation, by virtue of an incidental power, may raise to themselves authority to remove for just cause, though not expressly given by charter or prescription." The doctrine of that celebrated case has never been questioned from the time it was announced, and it is the law, both in England and in this country, at the

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present day. *Com. v. St. Patrick Ben. Soc.*, 2 Binn. 448, 449; 2 Kent. Com. 297.

As said by Chief Justice Tilghman, in *Com. v. St. Patrick Ben. Soc.*, *supra*, "Every incorporation possesses inherently the power of expulsion in certain cases, because such power is necessary to the good order and government of corporate bodies. There is a tacit condition annexed to the franchise of a member, which, if he breaks, he may be disfranchised. The cases in which this inherent power may be exercised are of three kinds;" and the second of which is, that "when the offence is against his duty as a corporator, in that case he may be expelled on trial and conviction by the corporation."

In this case, the statute authorizing the incorporation of the club authorizes the making of by-laws; and, by the by-laws made, the becoming a member requires the party to agree, as a condition, that he will submit to the rules and restrictions prescribed; and by one of the by-laws it is declared that any member conducting himself in a manner unbecoming a gentleman shall be subject to expulsion upon a vote of two-thirds of the members of the board of governors. There is, therefore, no want of authority for the expulsion of a member of the club for the offence designated in the by-law. And as the offence with which the relator was charged was one against his corporate duty as a member of the club, he could only be tried by the constituted corporate authorities, under the by-law; and if such trial was regularly conducted, and the judgment arrived at was in good faith, there is no power or jurisdiction in the courts to interfere with or reverse or vacate that judgment. *Rex v. Richardson*, *supra*; *Com. v. St. Patrick Ben. Soc.*, *supra*; *Gregg v. Mass. Med. Soc.*, 111 Mass. 185; *Lambert v. Addison*, 46 L. T. 25.

First, then, as to the alleged insufficiency of notice to the relator, and the supposed want of form and solemnity in the manner of trial. Putting aside mere technical formality, we think these objections are without reasonable foundation.

The relator was substantially and sufficiently notified of the accusation against him; and it was not necessary that there should have been a specification of the offence set out in the first notice served on him. The fact of his appearing before the board on the 25th of April, when he was fully informed of the specific nature and character of the charge, would seem to remove all ground for the alleged surprise. He was not only fully informed of the nature of the charge, but he recognized and admitted the fact of which the charge was predicated. He was not expelled until several days afterwards. The admonitory resolutions of the 25th of April, 1896, passed prior to his expulsion, he thought proper to disregard. And with respect to the supposed want of form and solemnity in the proceedings and judgment of the board of governors, we perceive no ground for the objection. The judgment was expressed in the form of a resolution, but it was clear and definite, and left no doubt as to the cause and foundation of the proceeding. It was upon the charge, and that only, of conducting himself in a manner unbecoming a gentleman, that the judgment was founded, and that was strictly within the terms of the by-law. Nothing more formal and technical was required. In the case of *Com. v. Union League Club*, 135 Penn. St. 301, there was a by-law of the club which gave the directors the power of expulsion "for acts or conduct which they might deem disorderly or injurious to the interest, or hostile to the objects of the club;" and it was held not to be essential to the validity of a conviction upon such charge, that there be a finding by the tribunal trying the offence, *in totidem verbis*; but it was sufficient if a resolution was passed, that the member was guilty of a violation of the by-law, based upon the fact that, without provocation, he had charged a fellow member in the club-house of acting like a blackguard.

Whether the conduct of the relator in accusing the lady a daughter of a member of the club, within the club, to members thereof, of writing anonymous letters, was such

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as made it unbecoming a gentleman, within the meaning of the by-law, was a question, as we have seen upon the authorities already cited, that could only be determined by the corporate authorities; and that it is only where it is made clearly to appear that such determination was *ultra vires*, or made contrary to good faith, that the courts can interfere. The courts can not sit as appellate tribunals to review the judgments of the corporate authorities in such cases. The parties concerned having constituted their own domestic tribunal for the trial and determination of questions of alleged violation of purely corporate duty, they must abide such determination, unless the authority be transcended, or there be fraud or bad faith shown.

In the case of *Gardner v. Freemantle*, 19 W. Rep. 256, before Lord Romilly, Master of the Rolls, that learned judge said: "I point out that these clubs are formed entirely for social purposes, and there must be some paramount authority to keep up their objects. In some cases the court will interfere with the exercise of that paramount authority, but only where there is moral culpability, or if the decisions arrived at are from fraud, personal hostility, or bias; but in cases of this description all that this court requires to know is, that the persons who are summoned really exercised that judgment honestly. The court will not decide whether they did rightly or wrongly in making their decision."

The leading case in England, and which is recognized as controlling authority, is that of *Dawkins v. Autrobus*, 17 Chan. Div. 615. That case was, in the first instance, decided by Jessel, Master of the Rolls, and whose judgment upon appeal was unanimously affirmed by the Court of Appeal, consisting of Lord Justices James, Brett and Cotton. The case was most thoroughly discussed by the Master of the Rolls, and also by the Lord Justices on Appeal.

In that case it was held, that the court would not interfere against the decision of the members of a club, professing to act under their rules, unless it could be shown, either

that the rules were contrary to natural justice, or that what was done was contrary to the rules, or that there had been *mala fides* in arriving at the decision. And it was also held, that a rule providing for the expulsion of a member, who should be guilty of conduct injurious to the interest of the club, was within the powers of regulation, and could be validly passed by a general meeting of the corporation. That is to say, that the power of expulsion was within the power of making by-laws for the government of the corporation.

In disposing of the case on appeal, just referred to, Lord Justice Brett said: "In my opinion there is some danger that the courts will undertake to act as courts of appeal against the decisions of members of the club, whereas the court has no right or authority whatever to sit in appeal upon them at all. The only question which a court can properly consider is, whether the members of the club, under the circumstances, have acted *ultra vires* or not, and it seems to me the only questions which a court can properly entertain for that purpose are, whether anything has been done which is contrary to natural justice, although it is within the rules of the club—in other words, whether the rules of the club are contrary to natural justice. Secondly, whether a person who has not condoned the departure from the rules has been acted against contrary to the rules of the club; and thirdly, whether the decision of the club has been come to *bona fide* or not. Unless one of those charges can be made out by those who come before the court, the court has no power to interfere with what has been done. This court has no right, in my opinion, to consider whether what has been done was right or not, or, even as a substantive question, whether what was decided was reasonable or not. The only question is, whether it was done *bona fide*."

Lord Justice Cotton said: "We are not here to sit as a court of appeal from the decision of the committee or of the general meeting. We are not here to say whether we should

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have arrived at such a conclusion or not, and the question whether the decision was erroneous or not can only be taken into consideration in determining whether that decision is so absurd or evidently wrong as to afford evidence that the action was not *bona fide*, but was malicious or capricious, or proceeded from something other than a fair and an honest exercise of the power given by the rule or by-law."

In deducing a conclusion from the cases, as to the power of the courts to interfere, Mr. Leach, in his Club Cases, page 47, says: "Clubs are essentially social institutions, and other objects are merely secondary and adventitious. Gentlemanly conduct and good feeling between the members are necessary for the maintenance and prosperity of the club, as a social institution; there must be some paramount authority to take note of any ungentlemanly behavior or breach of good feeling of the club, and that authority is usually vested in a committee. It is their duty, as well as their own and the club's interest, to inquire into any alleged offence against club morals, and, if need be, to take the initiative in instituting such inquiry. But the penalties on the convicted offender are so serious that it behooves them to act in a manner befitting what they are—a judicial or quasi-judicial body—and, in consequence, they should in such matters act strictly in accordance with the rules of the club, and the ordinary principles of justice; and they should pay particular attention to the constitution of the court, by seeing that due notices are sent to all the persons who ought to be summoned, whether as committeemen, witnesses or accused; and that no one who has any bias or personal interest in the matter in question should sit as a member of the tribunal on the inquiry; the accused person should be given full opportunity of defending himself; and finally, the decision should be arrived at in a *bona fide* manner, on the circumstances in evidence, without malice and without caprice. If any of these considerations can be shown to have been disregarded, then a judicial tribunal will inter-

fere, and the decision of the quasi-judicial tribunal will be set aside."

By the instruction granted at the instance of the respondent, taken in connection with the general charge by the court, the question would seem to have been fully and fairly submitted to the finding of the jury, and their finding is conclusive upon the subject of the fairness and *bona fides* of the trial by the board of governors. The jury were instructed that if they believed that the relator was, when before the board of governors, on the 25th of April, 1896, "then informed that the charge against him was that he had made a scandalous charge against a lady, a daughter of a member of the club, to members of the club, within the precincts of the club, in that he had charged such lady with writing anonymous letters, and that the relator then and there admitted that he had charged the lady in the club to members thereof with writing anonymous letters, then the board of governors were the exclusive judges of whether the facts so admitted constituted conduct unbecoming a gentleman, and the verdict should be for the respondent." This instruction was given in connection with the further charge to the jury, "that if they should find that the relator admitted the fact, on the occasion referred to, of having accused the lady within the club, to members thereof, of having written anonymous letters, then their verdict should be for the respondent. But if they should find that the relator did not admit the charge made against him, then the verdict should be for the relator." And in the conclusion of the charge to the jury, the court said: "It is not a question of propriety as to whether this board of governors reached a correct conclusion upon such admission, if it were made. We are not to criticise that action. We are simply to enquire whether the relator had a fair opportunity on that occasion to understand the charge that was made against him, with its specifications, and whether, being so fairly informed, he admitted it."

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Syllabus.

Though the discretion reposed in the board of governors should not, as we have seen, be capriciously or arbitrarily exercised, yet, until their determination is successfully impeached, that determination will be presumed to have been fairly and *bona fide* made. The law will not presume fraud or bad faith in the action of the board of governors. In other words, when a party comes into court for relief it is incumbent upon him to show the existence of facts to justify the interference of the court.

Here the verdict of the jury has negatived the existence of fraud or bad faith or want of fairness on the part of the board of governors in passing the resolution of expulsion; and there is, therefore, no ground for a *mandamus*, either to restore the relator to membership in the club, or to compel a retrial of the charge made against the relator. The judgment refusing the *mandamus* must therefore be affirmed; *and it is so ordered.*

*Judgment affirmed.*

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## MORRIS v. WHEAT.

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PLEADING AND PRACTICE; AMENDMENT; EJECTMENT; COMMON SOURCE OF TITLE; LANDLORD AND TENANT; ADVERSE POSSESSION; TENANTS IN COMMON.

1. The striking out of the name of one of several plaintiffs in ejectment is an amendment within the meaning of R. S. U. S., Sec. 954, and being within the discretion of the trial court is not appealable.
2. Where in ejectment all parties claim under a common source of title, the defendant is estopped to deny the validity of that title.
3. During the existence of the tenancy, neither a lessee nor his assigns can dispute the title of the lessor or his heirs, either by setting up title in themselves or in a third person.

4. In order to convert a tenancy into adverse possession there must be a clear, positive and continued disclaimer and disavowal by the tenant of his landlord's title, and assertion of an adverse right, brought home to the landlord.
5. One tenant in common may oust his co-tenants and claim title to the whole adversely, but notice of his adverse claim must be brought home to his co-tenants in order to bind them.
6. The amendment of a declaration in ejectment by striking out the name of one of the several original plaintiffs, where the amendment asserts the same title and same recovery, is not equivalent to the commencement of a new suit, so as to restrict the recovery of *mesne* profits for a period of three years before the filing of the amended declaration.

No. 651. Submitted May 6, 1897. Decided June 7, 1897.

HEARING on an appeal by the defendant from a judgment on verdict in an action of ejectment. *Affirmed.*

The facts are sufficiently stated in the opinion.

*Mr. Frank W. Hackett* for the appellant:

1. The court had no power to allow the plaintiffs to strike out the name of Sophia A. Parker, plaintiff.

Striking out a party plaintiff in an action of trespass was unknown to the common law. 1 Encyclopedia of Pleading and Practice, 543; *Pickett v. King*, 4 N. H. 212.

The power must be conferred by statute, or it does not exist. *Thanhauser v. Savins*, 44 Md. 414. No statute in force in this District has given the court such power. *Stodert v. Newman*, 7 H. & J. 251.

It is not granted by Section 32 of the Judiciary Act. Rev. St., Sec. 954. That section does not warrant a striking out of the name of a party. Its aid does not extend beyond the curing of defects in pleading. *Comegys v. Robb*, 2 Cr. C. C. 141; *Moores v. Carter*, Hemp. 64.

In *Tobey v. Claflin*, 3 Sumn. 379, Mr. Justice Story before trial allowed the plaintiff to strike out the name of a defendant, on the ground that, if the case went to trial, the plaintiff could enter a *nolle prosequi* against one defendant, under the authority of the reasoning in *Minor v. Bank*, 1 Pet. 46.

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Argument of Counsel.

Had the act authorizing amendments sanctioned this procedure, Mr. Justice Story would have rested his decision upon that act.

Under the New York code, power given by statute to referees to amend pleadings, "as the court upon such trial, upon the same terms, and with the like effect," does not extend to striking out the name of a party to the suit. *Billings v. Baker*, 6 Abb. Pr. 213.

2. The defendant is not estopped to show that plaintiffs, the heirs of George O. Dixon, do not have the legal title.

The learned judge fell into error in assuming the proof to be that Parker held a continuous possession from the death of George O. Dixon. It was a question of fact for the jury to determine. Where the mere existence of a tenancy is proved, the law presumes it to be from year to year. Best on Evidence, Ed. 1893, p. 361.

Estoppel, as between landlord and tenant, rests upon what is conceived to have been the intention of the parties to the contract of lease. A tenant does not have an active duty to perform by way of delivery of possession. On the death of the landlord during the term, the tenant is not to ascertain what has become of the estate, and at his peril select the person, whether devisee or heir, to whom he must deliver possession. His duty is discharged by removing his chattels and leaving the land unobstructed for the owner to enter. The extent of Parker's engagement was to quit the premises; and this act it is fair to assume he duly performed.

John A. Dixon supposed that the property belonged to his children, so that it is not easy to contemplate him as having entered the premises in the capacity of an heir. But it must be kept in mind that the possession of Parker as tenant is ended by his going out, so that the legal owner, whoever he is, may enter, if he chooses.

Plaintiffs fail to prove that the tenant remained in possession until August 1, 1864. Notwithstanding that John A. Dixon thought the premises had been given to his chil-

dren, the law will sustain a presumption that he, being in fact one of the heirs, did actually enter as an heir, so far as such presumption may be needful to support the contention that Parker did his duty.

3. The court should have granted defendant's motion for directing the jury to find for the defendant, for the reason that the plaintiffs had failed to prove a legal title. Plaintiffs failed to prove a legal title to the premises, the deed of Morgan and Cox, trustees, on its face disclosing a conveyance, not to the purchaser at the sale, but to a person named by said purchaser as having bought the property of the purchaser at a date previous to the date of the ratification of the sale. Dixon had obtained an equitable title only by virtue of such conveyance from the trustees. What the court ratified was a sale to Nally. The trustees never informed the court that Nally had sold the property three months before he applied, through them, for ratification of his purchase. Nor did the trustees ever report to the court that they had executed a conveyance to Dixon. They clearly exceeded their authority. They could convey to Nally only. The attempted conveyance to Dixon was a departure from the order of the court, and ineffectual to pass the legal title. See *Den v. Lambert*, 13 N. J. Law, 182.

If a deed to the purchaser is not in fact made by the trustee as directed by the decree, the effect of sale and payment of purchase money is to give the purchaser the equitable and not the legal title. *Sanders v. McDonald*, 63 Md. 503. The conveyance passed nothing beyond an equitable title, which does not support ejectment. *Smith v. McCann*, 21 How. 398.

4. The decree of sale, by virtue of which the deed to Dixon purports to have been made, was a void decree. The court had no jurisdiction to order a sale of real estate of which a nonresident infant was part owner. Even had a statute conferred power on the court to sell, no proper means were taken to bring the infant before the court; no guardian

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*ad litem* was appointed to represent the infant, and the order purporting to be a decree *pro confesso* against an infant for nonappearance upon an order of publication, was void.

Chancery originally had no power to decree a sale under partition proceedings, unless all parties consented. 2 *Leading Cases in Equity*, Ed. 1877, p. 915. In many States this power has been conferred by statute. It seems to have been given in 1831 by the legislature of Maryland. *Mewshaw v. Mewshaw*, 2 Md. Ch. 13. Our courts under the Maryland statutes could order only partition, not a sale, until 1876 (19 Stat. 202). See *Willard v. Willard*, 145 U. S. 116.

Two statutes provide for the sale of land held by an infant jointly with others, that of 1785, Ch. 72, Sec. 12; and 1786, Ch. 45, Sec. 8. The former requires the appearance of the infant before the chancellor, who is to examine all the circumstances, the infant being present, so that the chancellor may satisfy himself that the proposed sale is for the interest and advantage, both of the infant and of the other persons concerned. The legislature did not have in view infants living outside of the State.

The statute of 1786 permits a sale only after it appears that certain specified means of effecting a division of the land are not practicable. Later the legislature passed the act of 1797, Ch. 114, the 7th section of which provides that on a bill filed by a person holding land jointly or in common with an infant residing out of the State for the purpose of obtaining partition of land . . . the chancellor may direct a commission to issue writs to three persons . . . to go to the infant, etc." 2 *Kilty*, *in loco*; Abert, p. 101, Sec. 86.

The circuit court in 1828 refused to ratify a sale where a widow and adult heirs petitioned against minor heirs residing out of the jurisdiction. The court said it was doubtful if the court of chancery had jurisdiction to confirm a sale where the land was owned in part by nonresident infants. *Hastings v. Granberry*, 3 Cr. C. C. 332.

The legislature never meant that an infant's land should be taken from him and converted into money, except the infant were before the court, actually or constructively. The only constructive means of reaching him is not by advertisement in a District newspaper, but by sending to the infant, and appointing a guardian to take his answer. The authority of chancery to sell land of adults jointly owned did not exist at that time. As the sale of land in which an infant is interested as part owner, is wholly a creation of statute, the power to act is jurisdictional. The infant must be brought within the jurisdiction in the manner pointed out by statute, or the court does not acquire the right to proceed.

An order of publication was obtained evidently in compliance with section 1, act of 1795, Chap. 88. But this process was equally available when the statute of 1797 was passed, which pronounced it doubtful whether there was any method of proceeding where the infant resided out of the State. It is apparent that the legislature intended that this general act of publication should not be applied to nonresident infants.

The decision in *Bryan v. Kennett*, 113 U.S. 96 (1884), that the statute of Missouri authorizing publication included nonresident infants, is put on the ground that there was no exception in favor of nonresident infants from the provision for bringing nonresident defendants before the court. In Maryland, however, the act of 1797 plainly recognizes the exceptional position of this class of defendants.

To show want of jurisdiction in the court that granted the order of sale, is not to make a collateral attack. *Williamson v. Berry*, 8 How. 542.

The infant must be before the court. A court of chancery has jurisdiction over every infant residing within its territorial limits; and there are authorities that sustain the orders of such a court in disposing of real estate, even when the infant is not served. But these are cases where the subject-matter and the person both exist within the jurisdiction.

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Much will be presumed in favor of the validity of the proceedings of a court of general equity powers in dealing with real estate, where once it appears that it has jurisdiction over the subject-matter. *Sloane v. Martin*, 77 How. 249.

Where the infant is a nonresident, as in *Wheeler v. Garner*, the court does not get jurisdiction, unless a statute has conferred it. See language of Mr. Justice Field in *Galvin v. Page*, 18 Wall. 371.

5. Defendant had a right to argue to the jury the facts constituting adverse possession. The question of the character of the possession is to be submitted to the jury. *Gross v. Welwood*, 90 N. Y. 638; 18 How. 50; 5 Pet. 438.

Even if Parker had continued as a tenant without intermission down to August 1, 1864, and had taken the new lease while already in possession, his attorning to the children of John A. Dixon would have been notice to Mrs. Baker and Mrs. Wheat that he was henceforth holding adversely to them. *Willison v. Watkins*, 3 Pet. 43.

6. Defendant has a good title by adverse possession. Defendant traces title through H. A. Parker to the children of John A. Dixon. The latter are to be considered as holding adversely to the heirs, at least from August 1, 1864, though they must have asserted ownership as early as August, 1862.

By filing their amended declaration the plaintiffs began a new and different suit. The original declaration was that of three plaintiffs seeking to recover possession of a lot from a stranger as an entirety. Now, two plaintiffs seek to recover two undivided third parts of the same lot, presumably, as two tenants in common against a third. *White v. Moss*, 92 Ga. 244.

If a party, under the old form of action, amended his declaration by inserting a new count laying a demise from a different lessor, the statute of limitations was held to run until the date of the amendment. *Sicard's Lessee v. Davis*, 6 Pet. 124.

A change of parties plaintiff creates a new suit, even though the remaining plaintiffs are of those who had sued earlier. The trespass complained of in ejectment is a single act. An allegation that defendant entered and ejected W and B is not identical with an allegation that defendant, on the same day, ejected W, B and P. The identity of a joint action is destroyed by changing the parties.

The tenancy of Parker to the heirs was created not by an agreement to which they had been parties, for neither party knew, as matter of fact, that the relation had an existence between them. The law constituted three persons landlords, in lieu of the single individual of whom the tenant had hired. Should an owner die leaving unknown heirs, it would be impossible for a tenant for a term of years to disclaim, and acquire title by adverse possession, if the rule were that actual notice of his intention must be imparted. Like efficacy is given to constructive notice as if the party to be charged had been made aware of what was taking place. The neglect of Mrs. Wheat and Mrs. Baker to look after their property affords reasonable ground for charging them with constructive notice that the tenant had attorned to a hostile party.

Open and notorious control by the children, coupled with the attornment we assume Parker to have made, was sufficient notice to Mrs. Wheat and Mrs. Baker to create adverse possession in the children, and a similar adverse holding in their behalf by the tenant. *Willison v. Watkins*, 3 Pet. 43.

Neither Mrs. Wheat nor Mrs. Baker was seized of the lots, not having entered. When descent was cast, the promises were possessed by a tenant. Whether Parker's possession is such seizin in law as to make their respective husbands tenants by the curtesy, is hardly worth arguing, for the reason that the weight of authority in the United States is to the effect that adverse possession begun in the lifetime of the wife, when the husband has the right of

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courtesy initiate, runs against both husband and wife, and bars after twenty years the title of both, as well as that of her heirs, except for the saving of disability of married women, etc. Washburn on Real Property, 4th Ed. 180-181, and cases cited.

The right to sue had expired before the first suit was instituted, October 9th, 1888. Taking August 1st, 1864, as the date when adverse possession was begun, the letting of the premises was an open and notorious act, which the heirs were bound to notice. Mrs. Wheat and Mrs. Baker were under no disability. On the 10th of April, 1869, the Married Woman's Act of this District went into effect (Abert, p. 275), which removed any previous disability.

The Supreme Court of Illinois, construing the Married Woman's Act of that State, holds that it removes the protection of disability. *Castner v. Walrod*, 83 Ill. 178. Compare *Kibbe v. Ditto*, 93 U. S. 674. The Illinois act is nearly identical with our own.

By section 2, of chapter 16, act 21 James I, a *feme covert* whose disability is removed has ten years within which to bring her action. If twenty years have elapsed since the right of action first accrued, and ten of those years have been free from disability, the right of entry is barred. Angell on Limitations, Ed. 1876, pp. 493-494. Twenty years adverse possession bars the right of entry of a woman who was *feme covert* at its inception if the disability was removed ten years before the term of twenty years expired. *Willson v. Betts*, 4 Denio, 201. In August, 1884, therefore, the right of Mrs. Wheat's heirs to bring their action had ceased.

7. The 16th assignment of error raises the question for how long a period can plaintiffs recover damages as mesne profits where the statute of limitations is not pleaded. We asked the court to instruct the jury that such damages can be recovered for three years only before the bringing of the suit. We assign its refusal as error.

By a rule of court a plaintiff may unite under separate

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counts an action of ejectment and an action for mesne profits. (Rule 10). When thus united the several counts form but one action, and that an action of trespass.

The plea of "not guilty" lets in a broad line of defences, that need not be pleaded specially, such as adverse possession for twenty years, coverture, infancy, and the like. Courts do not favor special pleas in ejectment. *Barbour v. Moore*, 4 App. D. C. 535.

By analogy, the same plea ought to protect a defendant from the incidents of the plaintiff's regaining possession as effectually as it does from the main features of the claim for title. Until title is established, no damages by way of mesne profits can be recovered. Defendant in this anomalous suit ought not to be required to set up the special plea of limitation to the trespass *quare clausum fregit* upon which damages are claimed, any more than to that upon which title is claimed, since it is the same trespass. Of course, when a plaintiff subsequent to recovering possession brings his separate action for damages the defendant, to avail himself of the statute, should plead it. We are not aware that the precise point here presented has been decided.

It is proper to add that the learned judge overruled our prayer apparently on the ground that the suit was begun in 1888, thus allowing damages for eight years to 1896. But as we say that the suit was begun November 23, 1896, our prayer should have been granted, unless this court shall say that defendant ought to have filed her special plea of the statute.

*Mr. H. O. Claughton* for the appellees:

1. The permission to the plaintiffs to amend the declaration by striking out the coplaintiff Parker was not error. The statute authorizes the trial court to allow amendments to cure any defect in process or pleading. Sec. 954, R. S. U. S. The Supreme Court of the United States has held that under that statute the trial court may allow an amendment as

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radical as the striking out of one sole plaintiff and substituting another and changing the form of action from assumpsit to trover. *Chapman v. Barney*, 129 U. S. 677; *Bamburgh v. Terry*, 103 U. S. 40. The granting permission to amend is discretionary with the trial court and is not subject to review. *Manderville v. Wilson*, 5 Cranch, 15; *Shehy v. Manderville*, 6 Cranch, 253; *Wright v. Hollingsworth*, 1 Peters, 165; *United States v. Buford*, 3 Peters, 12; *Ex Parte Bradstreet*, 7 Peters, 624. Such amendments are allowed in Maryland and other States. *Kerwan v. Latour*, 1 Har. & J. 296; *Insurance Co. v. McGowan*, 16 Md. 47; *Glynn v. Locomotive Works*, 5 Allen, 317. The amendment can not be made in the appellate court. *Megher v. Stuart*, 6 Mo. App. 498. Amendment by striking out a plaintiff was always allowed in actions of ejectment. *Chadbune v. Radcliff*, 30 Me. 354; Tyler on Ejectment, 399-401. Also amendment by adding new plaintiff. *Rehoboth v. Hunt*, 1 Pick. 224; *Jackson v. Stiles*, 5 Conn. 418; *Thayer v. Holly*, 3 Met. 369; *Smith v. Vaughan*, 10 Peters, 366; *Johnson v. Huntington*, 13 Conn. 47; *Wilson v. King*, 6 Yerg. 493; *Stevens v. Fitch*, 2 Met. 505; *Minor v. Bank*, 1 Peters, 46.

2. The court did not err in refusing to grant the plaintiff's prayer as to the effect of the chancery proceedings in the case of *Wheeler v. McGowan et al.* Both parties claimed under the deed to George O. Dixon. That deed was the common source of title. *Anderson v. Reid*, 10 App. D. C. 426.

3. There was no error in the rulings of the court upon the question as to the defendants having attorned to the personal representative of George O. Dixon, or to the guardian of the supposed devisees of George O. Dixon. Even if there had been any evidence of such attornment, it would have been quite immaterial. On the other hand, if the contention is that such attornment was a disclaimer of the lessor's title and a declaration that the lessee held by adverse possession, in that case the bar would not begin to run until notice of the disclaimer and adverse holding had been

given to the lessor or his heirs at law. *Floyd v. Mintsey*, 7 Rich. R. 181; Tyler on Ejectment, p. 877; *McClung v. Ross*, 5 Wheat. 116. There is no evidence in the record of any such notice. There is no authority more decided upon the point than the decisions of the Supreme Court. *Bradstreet v. Huntington*, 5 Peters, 401, 439, and 2 Peters, 485; *Willison v. Watkins*, 3 Peters, 43; *Barr v. Gratz*, 4 Wheat. 213.

There is no pretence that the plaintiff ever had actual notice. It is intimated that, inasmuch as John A. Dixon was cotenant with the plaintiff, that notice to him was notice to them. But the sole possession of John A. Dixon would not have been an ouster of his cotenants until he had given them actual notice of his claim to hold adversely to them. How, then, could his deed to Parker, of which they had no notice, make Parker's holding adverse? *Floyd v. Mintsey*, *supra*; *Kirk v. Smith*, 9 Wheat. 241-288.

Even if Jane Baker and Emily Wheat had had actual notice they were, and continued to be, under the disabilities hereinbefore set forth. Mrs. Wheat was under disability as long as she lived. Her husband was tenant by the curtesy until his death, which occurred in 1879. The statute did not begin to run against the plaintiff Wheat until that time, and had not begun to run against Jane E. Baker when this suit was brought. There can be no adverse possession against a reversioner. Tyler on Ejectment, pp. 881-923-928-946; *Clarke v. Hughes*, 13 Barb., p. 147; Washb. on Real Property, 132-133; *Jackson v. Johnson*, 5 Cow. 74; *Jackson v. Schoonmaker*, 4 Johns., p. 390; *Austin v. Stevens*, 24 Me. 526.

4. The defendant either made defence on her paper title, or on the ground of adverse possession. If she relied on the former, claiming from a common source of title, she was estopped from disputing the legal title of George O. Dixon. If she relied upon adverse possession she is estopped because she went into possession under the title of Dixon, and never surrendered that possession. Bigelow on Estoppel, p. 450, *et seq.*

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Mr. Justice SHEPARD delivered the opinion of the Court :

1. This is the second appeal that has been prosecuted by the defendant, Louisa Morris, in an action of ejectment from an adverse judgment therein.

The suit was brought by three plaintiffs, the appellees, Milton M. Wheat and Jane E. Baker, and one George S. Parker, each claiming an undivided interest of one-third in the premises, and resulted on the first trial in a judgment in their favor. In obedience to the established practice in ejectment, that, "if one of several plaintiffs have no title, the coplaintiffs cannot recover," that judgment was reversed because of the want of title in said plaintiff, George S. Parker. He was held to be estopped by the recitals of a former deed, under which defendant claimed, from his grantor, John A. Dixon. *Morris v. Wheat*, 8 App. D. C. 379.

After the cases had been remanded for new trial, the court, on application of the plaintiffs, granted leave to amend by striking out the name of said Parker and changing the declaration so as to continue the suit in the name of said Wheat and Baker for the recovery of two-thirds of the premises. The defendant objected to the action of the court and reserved an exception which is the foundation of the first assignment of error.

2. If the striking out of the name of one of the plaintiffs in an action of ejectment is an amendment within the contemplation of the statute (R. S., Sec. 954), there is an end of the question; for it is well settled that the granting of leave to amend is a matter of discretion in the trial courts, the exercise of which is not subject of review on appeal. *Wright v. Hollingsworth*, 1 Pet. 165, 168; *Chapman v. Barney*, 129 U. S. 677, 681. The contention of appellant, that it is not an amendment within the purview of that section of the judiciary act, is founded on a strict and narrow construction in which we cannot concur.

In view of the mischief for which the act provided a

simple and much needed remedy, its interpretation ought to be as broad and liberal as its terms will reasonably permit. "In the administration of justice, matter of form not absolutely subjected to authority may well yield to the substantial purposes of justice." *Minor v. Mechanics' Bank*, 1 Pet. 46, 80.

Although the particular point as here raised has never been passed upon by the Supreme Court of the United States, we think it comes clearly within the rule of many of its decisions, a few of which only will be cited. In actions of ejectment amendments have been permitted, adding a new count alleging a demise by a lessor not named in the old counts (*Wright v. Hollingsworth*, 1 Pet. 165); extending the term (*Walden v. Craig*, 9 Wheat. 576); and introducing a new plaintiff in the person of a husband of one of the plaintiffs (*Chirac v. Reinicker*, 11 Wheat. 280, 302). In *Chapman v. Barney*, 129 U. S. 677, which was an action of assumpsit, the substitution of the sole plaintiff by another was declared an amendment within the discretion of the trial court.

3. The next point raised by the appellant is in respect of an alleged defect in the title of George O. Dixon, under whom plaintiffs claim by inheritance; but before its consideration, we must determine whether she was not estopped to impeach the validity of that title. The title of George O. Dixon was by conveyance from certain trustees appointed in a proceeding in equity to sell and convey certain lands, including the premises in controversy, about June 12, 1862. The title was attacked for want of jurisdiction in the court over the person of a nonresident infant. In the view that we have taken of the question of the estoppel, it is not necessary to set out the proceedings in court preliminary to the conveyance. For the purposes of the argument the contention of the appellant may be conceded to be sound.

It is admitted in the record that George O. Dixon paid the purchase money, received the deed, and entered into

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possession. He subsequently delivered the possession to William H. Parker under a lease for a term not stated. George O. Dixon died shortly afterwards. On August 4, 1864, one James F. Holliday, reciting himself "agent and attorney of John A. Dixon, of Alexandria, Virginia, administrator of George O. Dixon, deceased," renewed the lease to William H. Parker for ten years, who agreed to pay rent at the rate of \$60 per annum, and to pay all taxes and charges against the property. A right of renewal for ten years more was given to said Parker, as well as an option to purchase. This instrument was executed by both Parker and Holliday in the presence of subscribing witnesses. George O. Dixon died in Alexandria, Virginia, in 1862, leaving a will making John A. Dixon executor, and after devising certain parts of his estate, leaving the residue to the infant children of John A. Dixon. George O. Dixon really died intestate as to the premises in controversy, because his will was not attested in the manner required by the law of the District of Columbia. He left three heirs-at-law, namely, his brother, John A. Dixon, a sister (the plaintiff, Mrs. Baker), and another sister, the mother of the plaintiff Wheat.

The sisters appear not to have been aware of the ownership of the land by George O. Dixon, much less their inherited rights therein. John A. Dixon and William H. Parker at that time seem to have regarded the title as being in the infant children of said John A. Dixon under the will aforesaid. Parker remained in possession under his lease, but to whom he paid rent does not appear.

In March, 1869, Louisa Morris and her husband, Patrick, who afterwards died, entered into possession under a contract of purchase from said William H. Parker, the terms of which do not appear. On May 11, 1871, John A. Dixon made a conveyance of the premises to Henry A. Parker, a son of William H. Parker, and at the latter's request. This deed recited that the title was in the infant children of the grantor, and that he was their guardian. No authority of

any court was pretended for this conveyance. On the same day William H. Parker conveyed to Henry A. Parker, and assigned to him the said lease, which by its terms continued until August 1, 1874, subject to renewal. The character of the conveyance from William H. Parker to Henry A. Parker is not given in the bill of exceptions.

The bill of exceptions also states that a conveyance was made by Henry A. Parker to Patrick and Louisa Morris; but the instrument does not appear, and its terms and date are unknown.

It further appears that on March 10, 1886, the infant children of John A. Dixon, having become of age, made a deed upon a consideration of \$10 to Henry A. Parker; and it was on the same day that said John A. Dixon, as one of the heirs of George O. Dixon, made the conveyance to George S. Parker, which was held inoperative on the former appeal. Although the transactions between William H. Parker and Henry A. Parker and Patrick and Louisa Morris are left in much obscurity by the bill of exceptions, we think it is perfectly clear that whatever title the appellant has had or claimed is under George O. Dixon, who is the common source for all the parties. Under a familiar principle, she cannot now be heard to deny that he had a valid title. *Anderson v. Reid*, 10 App. D. C. 426, and cases therein cited.

4. The next question is whether the court erred in refusing to submit to the jury the evidence offered by defendant in support of her claim of adverse possession. Defendant claimed adverse possession from March, 1869, though it appears that her entry was then under an executory contract of some kind with William H. Parker; and it seems that her conveyance from Henry A. Parker, the character and date of which do not appear in the record, could not have been made until on or after May 10, 1871, which is the date of William H. Parker's conveyance to him. Several interesting questions have been presented and argued touch-

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ing the disabilities of coverture under which the two sisters of George O. Dixon labored at the time of his decease. These we do not consider it necessary to decide. For, assuming that the possession commenced in 1869, and that there was nothing to prevent the running of the statute, if it then began, we are of opinion that there was no error in refusing defendant's prayer for instruction. Notwithstanding the recitals of the lease contract made by Holliday, "agent and attorney," with William H. Parker, the same inured to the benefit of the heirs-at-law of George O. Dixon, deceased, as a renewal or continuation of the former tenancy and possession thereunder; at the least, there is nothing to warrant its being regarded as a repudiation of that lease.

This lease, which still had several years to run at the time of the appellant's acquirement of an interest in the premises, contained a covenant for renewal and for purchase at the option of the tenant, William H. Parker, and there is nothing in the evidence concerning his contracts for conveyance with Louisa Morris and his son, Henry A. Parker, that is inconsistent with his or their continued recognition of the title of George O. Dixon or his heirs. The assignment of the lease to Henry A. Parker at the time of the conveyance to him is an unequivocal act of recognition by both. The attempted conveyance by John A. Dixon, as guardian, to Henry A. Parker, was made on the same day, and appears to have been a part of the transaction between the Parkers, father and son; and both were made more than two years after the executory contract between William H. Parker and Louisa Morris under which her possession began. Holding under the lease from George O. Dixon, William H. Parker nor his assigns could dispute the title of his lessor or his heirs, either by setting up title in themselves or in a third person during the existence of the tenancy. *Willison v. Watkins*, 3 Pet. 36, 47, 51; *Barr v. Gratz*, 4 Wheat. 213, 222; *Woodward v. Brown*, 13 Pet. 1, 4.

The tenant may, however, without actual surrender to

his landlord, remain in possession, assert title in himself, and lay a foundation for the completion of a title by adverse possession, for a sufficient period.

But whilst this right exists, it is subject to certain plain and essential conditions. As was said by Mr. Justice Nelson: "The trustee may disavow and disclaim his trust; the tenant, the title of his landlord after the expiration of his lease; the vendee, the title of his vendor after breach of contract; and the tenant in common the title of his cotenant; and drive the respective owners and claimants to their action within the period of the statute of limitations. The only distinction between this class of cases and those in which no privity between the parties existed when the possession commenced is in the degree of proof required to establish the adverse character of the possession. As that was originally taken and held in subserviency to the title of the real owner, a clear, positive and continued disclaimer and disavowal of the title, and assertion of an adverse right, and to be brought home to the party, are indispensable before any foundation can be laid for the operation of the statute. Otherwise the grossest injustice might be practiced; for, without such notice, he might well rely upon the fiduciary relations under which the possession was originally taken and held, and upon the subordinate character of the possession as the legal result of those relations." *Zeller's Lessee v. Eckert*, 4 How. 289, 295.

It is very clear that no actual notice of an adverse claim or possession was given to the heirs of George O. Dixon, represented in this suit. As we have before said, there was nothing in the evidence of the transaction of William H. Parker and his assigns necessarily inconsistent with the relation of tenant. There is no evidence whatever of such acts of open, adverse claim of title and possession as might be sufficient in law to put the heirs upon notice. *Ricard v. Williams*, 7 Wheat. 59, 106, *et seq.*; *Bradstreet v. Huntington*, 5 Pet. 402, 445; *Speidel v. Henrici*, 120 U. S. 377, 386.

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Nor is there anything to strengthen the defendant's case in the situation by which the conveyance from John A. Dixon to her grantor, Henry A. Parker, is made to inure to her benefit. All that is effected thereby is the acquirement of the title of one of the three tenants in common as heirs at law of George O. Dixon. She did not enter under that deed. Her possessions then existed in subordination to the lease which had still three years to run.

Unquestionably, one tenant in common may oust his cotenants and claim the title to the whole adversely. But to constitute an adverse possession in such a case the evidence must show some distinct facts tending to bring notice of the same home to the cotenants. *Barr v. Gratz*, 4 Wheat. 213; *McClung v. Ross*, 5 Wheat. 116, 124; *Bradstreet v. Huntington*, 5 Pet. 402, 440; *Speidel v. Henrici*, 120 U. S. 377, 386.

5. The last assignment of error is on an exception taken to the refusal by the court of a special instruction limiting the assessment of damages for mesne profits to a period commencing three years before the date of the amended declaration. The yearly value was admitted to be \$180, and at plaintiff's request the jury were instructed to return a verdict for two-thirds of that sum per year for eight years.

The original declaration was filed something more than eight years before the trial. Defendant's prayer for instruction was based on the assumption that the amendment of the declaration, striking out the name of one of the three original plaintiffs, must be regarded as equivalent to the commencement of a new suit. This is an extremely technical view of the effect of that amendment, and in the absence of controlling authority, we must decline to accept it. The amendment made no change in the cause of action. The two remaining plaintiffs asserted the same title and prayed the same recovery as in the original declaration; nothing more and nothing less. Defendant was deprived of no defence that she had before. There was nothing to alter her position in the case or to require additional evidence or

preparation for the trial. She could not be prejudiced in any particular.

It is an entirely different case from that of an amendment adding a new count in ejectment on a demise from a new party asserting a different title, as in *Sicard v. Davis*, 6 Pet. 124, or from that in *Johnson v. District of Columbia*, 1 Mackey, 427, wherein no cause of action at all had been alleged before the amended declaration was filed. It would be impossible to lay down, in one case, a fixed rule by which the effect of an amendment, in this respect, may be determined with accuracy in all others. Each case must turn upon its own special circumstances. Whilst amendments making substantial changes in the cause of action and putting parties upon new lines of defence not necessary or pertinent to the case made in the original pleading ought generally to be regarded as equivalent to the institution of new suits, still the rule should never be so strictly applied as to work what might be palpable injustice, in the absence of negligence on the part of the plaintiffs.

Finding no error in the record, the judgment will be affirmed, with costs to the appellees.

*Affirmed.*

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## THE WASHINGTON AND GEORGETOWN RAIL- ROAD COMPANY

v.

McLANE.

EVIDENCE; DECLARATIONS; RES GESTÆ; APPELLATE PRACTICE;  
PREJUDICIAL ERROR.

1. The tendency is to extend and liberalize the principle of admission of declarations as part of the *res gestæ*.
2. The declaration of a boy fourteen years of age mortally injured in a street railway accident, made while lying between the tracks from 5 to 10 minutes after the occurrence, as to the cause of his

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injury in response to a question of his mother, is admissible as part of the *res gestæ* in a suit by his administrator, especially where the truth of the declaration is to a certain extent corroborated.

3. In such a case, similar declarations made by the deceased while in an ambulance on his way to a hospital in answer to questions addressed to him by the officer in charge of the ambulance, are inadmissible.
4. But in such a case if such declarations to the officer were substantially but repetitions of the statement made at the place of the injury, their admission in evidence, though erroneous, is not reversible error, the error not being prejudicial.

No. 647. Submitted April 8, 1897. Decided June 7, 1897.

HEARING on an appeal by the defendant from a judgment on verdict in an action to recover damages for death by alleged wrongful act. *Affirmed.*

The facts are sufficiently stated in the opinion.

*Mr. Enoch Totten* and *Mr. Howe Totten* for the appellant.

*Mr. T. A. Lambert* and *W. H. Sholes* for the appellee.

Mr. Chief Justice ALVEY delivered the opinion of the Court :

This is an action under the statute by an administrator, brought to recover damages of the defendant, for the alleged negligent killing of the intestate. The intestate, William Ghio, was a boy about fourteen years of age, engaged in selling newspapers on the streets of the city of Washington. It is alleged, and shown in proof, that the boy was forced off one of the defendant's street cars, as it is alleged, by the conductor of the car, and by that means was knocked down, run over and fatally mangled by another of the defendant's cars on the adjacent tracks, and from which injuries the boy died within a few hours.

The only question in the case is, whether there was error committed by the court below in allowing to be proved to the jury certain declarations or statements of the boy, made a very short time after the occurrence of the accident, in

answer to questions propounded to him, as to how the accident happened, and who was the cause of it.

It appears that while lying between the tracks at the place of the accident, with his legs nearly severed from his body, a few minutes, it may have been from five to ten minutes, after the occurrence of the injury, in response to questions by his mother, as to how the accident happened, he said, "He shoved me off;" and when asked who, his reply was, "Conductor Fleming." And another witness testified that when he reached the scene of the accident the mother had the little boy up in her arms, and she asked, "Willie, how did this happen?" and his reply was, "The conductor kicked me off the car." The truth of this statement of the boy is, to a certain extent, corroborated by the testimony of another newspaper boy who was on the car at the time of the occurrence. He says he saw the conductor's foot raised in the direction of the boy, and he saw the boy at the same moment in the act of falling to the ground. The admissibility of the declarations of the deceased were excepted to by the defendant, and whether such declarations by the deceased were admissible or not, as part of the *res gestæ*, is the question presented.

It is certainly true, that it is not always easy to determine when declarations having relation to an act done, and professing to explain or account for such act, are admissible as part of the *res gestæ*. There is great contrariety in the decisions upon the subject; but the tendency of recent decisions is to extend and liberalize the principle of admission, and declarations and statements are now, by many recent decisions of high authority, admissible that would formerly have been excluded. The application of the principle of admission is largely dependent upon the special circumstances of each case as it occurs. In the English decisions, where the principle has been applied with the greatest strictness, it was held by Lord Holt, in the case of *Thompson v. Trevanion*, Skin. 402, and since repeated and approved in

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the case of *Rex v. Foster*, 6 C. & P. 325, that a statement made by a party injured immediately after he was knocked down, as to how the accident happened, was admissible. The declarations, however, to be admissible, must be the natural emanations or promptings of the act or occurrence in question, and although not exactly concurrent in point of time, yet if they were voluntarily and spontaneously made, and so nearly contemporaneous as to be in the presence of the transaction which they illustrate and explain, and were made under such circumstances as reasonably to exclude the idea of design or deliberation, such declarations are admissible as part of the *res gestæ*.

The declarations made by the deceased at the place of the accident were made so recently after the injuries received, and under such distressing circumstances as to preclude the idea of design or deliberation, and would seem to be but the natural expression of the impressions made upon his mind by the actual occurrence. The age and suffering of the boy, and all the surrounding circumstances, utterly exclude all idea of calculation or ability to manufacture evidence for ulterior purposes. We think the declarations were clearly admissible, and that the ruling of the court was fully within the principle of the cases of *Insurance Co. v. Mosley*, 8 Wall. 397; *Metropolitan R. Co. v. Collins*, 1 App. D. C. 387; *Snowden v. United States*, 2 App. D. C. 89; *The Augusta Factory v. Barnes*, 72 Ga. 217; *City of Galveston v. Barbour*, 62 Tex. 172; *Railway Co. v. Buck*, 116 Ind. 566; *Leahey v. Railway Co.*, 97 Mo. 165.

But though we think the declarations made by the boy at the place of the accident were admissible, we think the declarations made by him in the ambulance on the way to the hospital, in answer to the questions addressed to him by the officer in charge of the ambulance, could hardly be justified by the cases. He had then been removed from the scene of the accident, and his statement to the officer was of the character of a narrative of a past occurrence. We

think these declarations to the officer should have been excluded; but it is manifest their admission did the defendant no harm or injury whatever. They were substantially but mere repetitions of the declarations or statements made at the place of the injury. We shall not therefore reverse the judgment for the error in admitting these declarations. The principle is well settled that an appellate court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, and we are decidedly of opinion that no injury was done by the error just mentioned. The judgment, therefore, will be affirmed; and it is so ordered.

*Judgment affirmed.*

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### DROOP v. RIDENOUR.

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DEEDS; CONSIDERATION; ALIMONY; HUSBAND AND WIFE; BURDEN OF PROOF; FRAUD; ASSIGNMENTS FOR BENEFIT OF CREDITORS; PREFERENCES; EVIDENCE; AUTHENTICATION OF DOCUMENTS.

1. It is competent for the grantee in a deed attacked for fraud to show by parol that the true consideration for the conveyance was greater than that recited, the only requirement being that the true or superadded consideration must be of the same nature and kind as that stated in the deed and not inconsistent with it.
2. The surrender of a claim for alimony due, or to become due, under a decree of court, constitutes a valuable consideration as against the creditors of a party bound to pay such alimony.
3. The existence of the relation of husband and wife between the grantor and grantee in a deed does not of itself create a *prima facie* presumption of fraud against creditors.
4. When a deed is attacked by creditors as fraudulent and collusive and the charge includes one of embezzlement against the grantor, the complainants must sustain the burden of proof

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which is upon them by clear and indubitable proof, and not upon presumptions and suspicions.

5. In such a case, the conveyance, if for a valuable and adequate consideration, will be upheld as against the grantor's creditors, however fraudulent his purpose in making it was, if the grantee had no knowledge of such purpose.
6. While an absolute conveyance of property by a debtor directly to one of his creditors in payment and discharge of a pre-existing debt or liability, may have the effect of giving a preference to such creditor, it is not an assignment for the benefit of creditors within the meaning of the act of Congress of February 24, 1893, declaring void all preferences of one creditor over another in voluntary assignments for the benefit of creditors.
7. Where creditors attack a deed of their debtor to a third person as fraudulent, they cannot in the same suit, upon the failure of the proof to sustain the charge of fraud, successfully contend that it was, as an assignment for the benefit of creditors, void as making a preference.
8. The method of authentication of documents prescribed by the act of Congress of 1890, is not exclusive of any other which the States may adopt; so that a document offered in evidence in a suit in this District, insufficiently authenticated under that act of Congress, will be admissible if properly authenticated under the Maryland act of Assembly of 1785, Ch. 48, Secs. 1 and 2, in force here.
9. Where a decree of divorce offered in evidence in a collateral suit is not offered to operate as an estoppel, but only by way of explanation and as corroborative of other testimony, the failure to prove the pleadings and depositions in the divorce proceedings is not ground for rejecting the decree itself.

No. 669. Submitted April 30, 1897. Decided June 22, 1897.

HEARING on an appeal by the complainants from a decree dismissing a bill in a suit in equity to have a conveyance of an interest in certain real estate declared void as having been made to hinder, delay and defraud creditors. *Affirmed.*

The facts are sufficiently stated in the opinion.

*Mr. Charles A. Keigwin* and *Mr. William B. Matthews* for the appellants:

1. Apart from any question as to actual or intentional

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fraud, and assuming that Mrs. Ridenour accepted the deed *bona fide* and in discharge of a valid debt, this conveyance can not stand because it amounts to an assignment of the debtor's whole estate with an unlawful preference of a single creditor. Act of February 24, 1893 (2 Sup. R. S. 90). A transfer of the debtor's whole estate is an assignment, and is not the less so because made by several conveyances or in various forms: if the result is a general assignment, the transaction is subject to the same rules as apply to assignments in ordinary form. *White v. Cotzhausen*, 129 U. S. 329; *Preston v. Spaulding*, 120 Ill. 208; *Freund v. Yeagerman*, 26 Fed. Rep. 814; *Winner v. Hoyt*, 66 Wisc. 229; *Van Patten v. Burr*, 52 Iowa, 518; *Berry v. Cutts*, 42 Me. 445; *Bank v. Gilmer*, 116 N. C. 684; 117 N. C. 416; *Rison v. Knapp*, 1 Dillon, 186.

It is no objection to granting relief, as against an illegal assignment, that the bill is not framed in contemplation of that aspect of the case. The facts established making a case for relief, the court will decree accordingly without regard to the defects in the bill. If necessary, amendment may be made to meet the facts as developed. *Neale v. Neale*, 9 Wall. 1; *Tremolo Patent*, 23 Wall. 518. So on appeal this court has directed the bill to be amended to cover the relief decreed. *Lyon v. Smith*, 2 App. D. C. 37.

2. The deed is fraudulent as to the grantor. The transaction presents an unusual number of the badges of fraud. 1st. The near relationship of the parties. 2d. The deed was made while the grantor was absconding, which is a badge of fraud. *Danjean v. Blacketer*, 13 La. Ann. 595. 3d. The consideration is falsely stated. This is a badge of fraud, and tends to deceive creditors. *Bump. Fraud. Convey.* 42; *DeWalt v. Doran*, 21 D. C. 174. 4th. The expressed consideration is inadequate. *Humes v. Scruggs*, 94 U. S. 28. 5th. The transfer was made in contemplation of a suit against the grantor. 6th. The secrecy of the transaction. 7th. The deed conveyed the whole of the grantor's worldly posses-

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sions, a fact which has always been held suspicious since *Twyne's Case*.

3. The burden of proof is on the defendants. The complainants having shown that the conveyance was made under suspicious circumstances and was fraudulent as to the grantor, the deed can be supported only by affirmative proof of good faith and the payment of a valuable consideration on the part of the grantee. The complainants are not bound to make direct proof of fraud. Circumstantial evidence is admissible to prove fraud, and is in most cases the only possible evidence. *Rea v. Missouri*, 17 Wall. 532; *Kempner v. Churchill*, 8 Wall. 362; *Waterbury v. Sturtevant*, 18 Wend. 353; 3 Greenleaf Evid., Sec. 254; 1 Story Eq. Jur., Sec. 190; *King v. Moon*, 42 Mo. 551; *Jackson v. Mather*, 7 Cowen, 301. Circumstantial evidence will overcome sworn answers in equity. *Bowden v. Johnson*, 107 U. S. 251; *Wheelden v. Wilson*, 44 Me. 1; *Sayre v. Frederick*, 1 C. E. Green, 209; *Hendricks v. Robinson*, 2 Johns. Ch. 301; *Alexander v. Todd*, 1 Bond, 175; *Walter v. Lane*, 1 MacA. 280. Direct proof of an actual agreement to defraud is never expected. *Watkins v. Wallace*, 19 Mich. 77; *DeWalt v. Doran*, 21 D. C. 163; *Singer v. Jacobs*, 11 Fed. Rep. 559.

Proof of fraud in the grantor shifts the burden to defendants. They are bound to explain every suspicious circumstance and to furnish affirmative proof of good faith. *Crawford v. Neal*, 144 U. S. 585; *Jones v. Simpson*, 116 U. S. 609; *Venable v. Bank*, 2 Peters, 107; *DeWalt v. Doran*, 21 D. C. 163. All doubts remaining after defendants' evidence must be resolved against them. *Clements v. Moore*, 6 Wall. 315; *Alexander v. Todd*, 1 Bond, 175. Defendants can not rely upon the deed because it is admitted to be false in the recital of consideration. *Watt v. Grove*, 2 Sch. & Lef. 502; *DeWalt v. Doran*, 21 D. C. 163; *Callan v. Statham*, 23 How. 477.

4. Mrs. Ridenour is not a purchaser in good faith. Assuming for the present, that she paid a valuable consideration

for the conveyance, yet the circumstances of the transaction, as narrated by herself, indicate that she knew of Albert's fraudulent purpose, or at least was bound to know of it. A conveyance taken under such circumstances is void as to creditors, although the grantee may have paid a valuable consideration. It is not necessary to impute to Mrs. Ridenour any corrupt or even discreditable motives, or to prove that she shared the fraudulent purpose of the grantor. *Enders v. Swayne*, 8 Dana, 103; *DeWalt v. Doran*, 21 D. C. 175; *Edgell v. Lovell*, 4 Vt. 412; *Humphries v. Freeman*, 22 Texas, 50. It is sufficient that Mrs. Ridenour knew, or by reasonable diligence might have known, of Albert's purpose to defraud creditors. This is true even when a present consideration of value is paid at the time of the conveyance, and *a fortiori* when the only consideration is antecedent indebtedness. *Cadogan v. Kennett*, 2 Cowp. 432; *Crowminshield v. Kittredge*, 7 Metc. 520; *Blennerhasset v. Sherman*, 105 U. S. 100; *Clements v. Moore*, 6 Wall. 311; *Biddinger v. Wiland*, 67 Md. 359; *Zimmer v. Miller*, 64 Md. 38; *Hancock v. Horan*, 15 Texas, 507; *Foster v. Grigsby*, 1 Bush, 86; *Hough v. Dickinson*, 58 Mich. 89; *Johnson v. Brandis*, 1 Ind. 263.

It is not material whether or not Mrs. Ridenour believed that Albert's purpose was fraudulent, if the facts were sufficient to indicate that purpose to a person of ordinary prudence. *Toof v. Martin*, 13 Wall. 40; *Wager v. Hall*, 16 Wall. 601; *Coburn v. Proctor*, 15 Gray, 38; *Shauer v. Alterton*, 150 U. S. 607. A conveyance is always suspicious, and the vendee is bound to make inquiries, when the vendor undertakes to transfer all his property; in such a case, the vendee who takes without inquiry takes the risk of having the conveyance avoided by other creditors. *Walbrun v. Rabbitt*, 16 Wall. 577; *Hoffer v. Gladden*, 75 Ga. 537; *Read v. Moody*, 6 Vt. 668.

The fact that a debt has been long overdue, and that the creditors have been unable to secure any payments by frequent pressure, put such creditors on inquiry when the

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debtor offers to transfer his whole property to them. *Wager v. Hall*, 16 Wall. 602; *Toof v. Martin*, 13 Wall. 40. That suspicious circumstances will charge a vendee with notice of a vendor's guilty purpose, is well illustrated in *Green v. Tantum*, 4 C. E. Green (19 N. J. Eq.), 105.

5. The borrowed money is not a valid consideration. The rule is well settled that a wife can not, as against creditors of her husband, reclaim money belonging to her which she has permitted him to use in his business or for the payment of his debts, unless there has been an express and definite promise of repayment made at the time of the advance. *Humes v. Scruggs*, 94 U. S. 27; *Jackson v. Beach*, 9 Atl. Rep. 380; *Wake v. Griffin*, 2 N. W. Rep. 461; *Warwick v. Lawrence*, 43 N. J. Eq. 179; *Bank v. Jenkins*, 65 Md. 245; *Jenkins v. Middleton*, 68 Md. 540; *Edelin v. Edelin*, 11 Md. 415; 2 Bright, Husb. and W., 259; *Clinton v. Hooper*, 1 Vesey, Jr., 188; *Grover Co. v. Radcliff*, 63 Md. 496; *Steadman v. Wilbur*, 7 R. I. 481; *Hanson v. Manley*, 33 N. W. Rep. 357.

6. The alleged alimony is not valid consideration. The alimony set up as part of the consideration consists of both future and accrued alimony. The conveyance is said to be in commutation of all future alimony, but only in partial satisfaction of accrued alimony. There is no proof of the alleged divorce.

The copy of the alleged decree put in evidence is incompetent because not properly certified, there being no certificate that the attestation is in due form as required by section 905, R. S. U. S. This omission is fatal to the validity of the copy as evidence. *U. S. v. Biebusch*, 1 Fed. Rep. 213; *Craig v. Brown*, Peters C. C. 352; *Trigg v. Conway*, Hempstead, 538; *Turner v. Waddington*, 3 Wash. C. C. 126. Nor is the copy made competent evidence by the Maryland act of 1785, Ch. 46, Sec. 1, which allows proof to be made by the seal of the court, of "any debt of record;" because a decree is not a record, a court of equity not being a court of record; and alimony is not a debt, and a decree

for alimony does not evidence a debt of record. *Tolman v. Leonard*, 6 App. D. C. 224; *Pain v. Pain*, 80 N. C. 322; *Lyon v. Lyon*, 21 Conn. 185. A decree is not proved by filing a copy. *Humes v. Scruggs*, 96 U. S. 22. The Maryland act is not in force in this District, but is superseded by the act of Congress of 1790, R. S. U. S., Sec. 905, under which copies must be certified. *Gardner v. Lindo*, 1 Cr. C. C. 78. The only exception is of cases within Sec. 13 of the act of Feb. 27, 1801. *Parrot v. Habersham*, 1 Cr. C. C. 14.

Proof of alimony is inadmissible to vary the consideration expressed in the deed. The deed expresses a cash consideration. This is admitted to be untrue. While the parties to a deed may prove other consideration additional to that expressed, this liberty is allowed only when the expressed consideration is a true consideration. *Betts v. Bank of Md.*, 1 Har. and G. 186; *Clarkson v. Hanway*, 2 P. Wms. 203; 1 Fonblanque, Equity, 202; *Cole v. Albers*, 1 Gill, 412. Even when the consideration is truly expressed, additional consideration can not be shown unless the deed reads "and for other considerations." *Maigley v. Hauer*, 7 Johns. 341. Again, when it is permissible to vary the expressed consideration, the proof is limited to additional consideration of the same character with that expressed, and other consideration of different character cannot be shown. If the expressed consideration is a monetary one, marriage cannot be shown as an additional consideration. 1 Phillips, Evid., 552 and note 972; *Watt v. Grove*, 2 Sch. & Lef. 492; *Bridgman v. Green*, 2 Vesey, 628; *Peacock v. Monk*, 1 Vesey, 128. Alimony is not a monetary consideration, but is simply money paid in consideration of marriage. *Tolman v. Leonard*, 6 App. D. C. 224.

Future alimony can not be commuted. *Linton v. Linton*, L. R. 15 Q. B. 239; *Kempster v. Evans*, 81 Wisc. 247; *Jordan v. Westerman*, 62 Mich. 170; *DeBlaquiere v. DeBlaquiere*, 3 Hag. Ecc. 322. The proposed commutation of alimony con-

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stitutes a secret trust, unlawfully reserved to the grantor. This is a fraud in law, and avoids the conveyance. *Means v. Dowd*, 128 U. S. 273; *Lukins v. Aird*, 6 Wall. 78. The alleged arrears of alimony do not constitute a debt which can be held valid as against creditors. *Tolman v. Leonard*, 6 App. D. C. 224.

7. A conveyance, such as the one in this case, must be supported by evidence other than that of the parties. Here only one of the parties is offered to vindicate the transaction. *Enders v. Swayne*, 8 Dana, 103; *Besson v. Eveland*, 26 N. J. Eq. 468; *Clarke v. McGeihan*, 25 N. J. Eq. 423; *Bartles v. Gibson*, 17 Fed. Rep. 293; *Venable v. Bank*, 2 Peters, 107; *Bank v. Beckman*, 36 N. J. Eq. 83; *Carbiener v. Montgomery*, 66 N. W. Rep. 900; *Jones v. Campbell*, 84 Iowa, 357.

*Mr. Clarence A. Brandenburg* for the appellee, Alice E. Ridenour:

1. The conveyance is not an illegal preference. The act of February 24, 1893, relates exclusively to voluntary assignments by debtors for the benefit of creditors. Neither the act nor the many authorities cited by appellants have any application whatever to the case under consideration. The act was taken from the statute of Illinois. In the case of *White v. Cotzhausen*, 129 U. S. 329, cited by the appellants, the Supreme Court went to the extreme and its opinion has since been discredited by the court itself. It involved the construction and effect of a State statute, and the court attempted to decide the case in accordance with the decisions of the highest court in the State of Illinois, but evidently misapprehended the decisions of the highest court of Illinois in cases involving the construction of the same sections of the same act. Subsequently the Supreme Court of Illinois in several cases had occasion to consider the decision of the Supreme Court in *White v. Cotzhausen*. *Walker v. Ross*, 150 Ill. 50; *Farwell v. Nillson*, 133 Ill. 52; *Moore v. Meyer*, 47 Fed. R. 99.

In *Bank v. Bank*, 136 U. S. 223, the Supreme Court had occasion to consider the effect of a Missouri statute similar to the Illinois statute, and there held the making of a deed of trust and the appointment of a receiver, who was the same person as the trustee under the trust, on the same day, and as part of a proceeding to administer the assets of an insolvent partnership for the benefit of all the creditors, did not constitute an assignment. See also *Cissell v. Johnston*, 4 App. D. C. 345.

2. The deed is not fraudulent as to the grantor. But even if it were, that fact could not affect the title of Mrs. Ridenour under the circumstances appearing in this case. The law is well settled that the title of a vendee can not be affected or impaired by the alleged fraudulent conduct of the vendor, unless a conspiracy to the fraud is shown.

3. The burden of proof is on the complainants. Fraud can not be presumed or inferred without proof in a court of equity any more than a court of law, and in both the rule is that he who make the charge must prove it. *Hager v. Thompson*, 66 U. S. 80; *Connor v. Featherstone*, 12 Wheat. 199; *Collins v. Thompson*, 22 How. 246; *Clark v. Hackett*, 1 Black, 77; *Hill v. Reifsnider*, 46 Md. 555; *Tompkins v. Nichols*, 53 Ala. 197; *Baldwin v. Buckland*, 11 Mich. 389. While it may be that proof of fraud in the grantor shifts the burden to the defendant, it does not shift it for all purposes. Upon proof of fraud in the grantor, the burden is shifted to the defendant to show that she gave a valid consideration, and then the burden devolves upon the complainants to show that she purchased with guilty knowledge and fraudulent intent. In this case the proof necessary to shift the burden to Mrs. Ridenour has not been made, but assuming the testimony is sufficient, in this particular, yet the consideration was abundant, as hereinafter shown, and the burden still remains with the complainants to show that she purchased with guilty knowledge and a fraudulent intent. *Crawford v. Neal*, 144 U. S. 585.

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4. Mrs. Ridenour is a purchaser in good faith. She neither had actual notice, nor are there any facts in the record sufficient to charge her with notice of any fraudulent purpose on the part of her grantor. The true principle, as stated by the Supreme Court in *Shauer v. Allerton*, 150 U. S. 607, is that "Whatever is notice enough to excite attention and put the party on his guard and call for inquiries, is notice of everything to which such inquiry might have led." While the facts in the case do not call for investigation or inquiry, yet such inquiry would not have led to an ascertainment of an alleged embezzlement and a purpose on the part of Albert Ridenour to defraud the complainants. Knowledge of the existence of the alleged embezzlement and resulting indebtedness, is as vital under the circumstances as knowledge of a purpose to defraud the complainants.

5. The existing indebtedness was a valuable consideration for the subsequent conveyance, inasmuch as the money loaned to Albert Ridenour was part of the separate estate of Mrs. Ridenour, and, at the time of the loans, he expressly promised to repay the same. *Metsker v. Bonebrake*, 108 U. S. 66; *Hitz v. Bank*, 111 U. S. 722; *Bump on Fraudulent Conveyances*, pp. 179, 183, 311; *Seymour v. Wilson*, 19 N. Y. 417; *Adams v. Wheeler*, 10 Pick. 199; *Bank v. Timble*, 76 Ind. 195; *Mayfield v. Kilgour*, 31 Md. 240.

6. The release of alimony due and to accrue is a valid consideration. The testimony shows that part of the consideration for the conveyance was the release of the arrearages of alimony amounting to about \$1,100, and of all claims for future alimony. While the expression is used that the conveyance was made "in commutation of future alimony," the word "commutation" is inaccurate. The alimony to accrue was not commuted. Ridenour was merely released from the payment of future alimony.

The deed reciting a valuable consideration, proof of the true consideration, if also valuable, may be given. *Bank v.*

*Hitz*, 111 U. S. 722; *Greenleaf on Evidence*, Secs. 285, 304; *Richardson v. Traver*, 112 U. S. 423; *Cunningham v. Dwyer*, 23 Md. 220; *Shirras v. Craig*, 7 Cr. 50; *Bullard v. Briggs*, 7 Pick. 533; *Bump on Fraud. Conv.*, p. 596. Alimony is a valuable consideration. *Barber v. Barber*, 21 How. 382; *Hobbs v. Hall*, 1 Cox, 445; *Werrell v. Jacob*, 3 Mer. 256; *Bump on Fraud. Conv.*, p. 395.

7. A *bona fide* purchaser without notice of the fraudulent intent of the vendor and for a valuable and good consideration, no matter what relationship existed between them, is entitled to hold as against all creditors and other persons. *Thorpe v. Thorpe*, 12 S. C. 154; *Schwabacker v. Rush*, 81 Ill. 311; *Erbe v. Cole*, 31 Ark. 554; *Grant v. Ward*, 64 Me. 239; *Thornton v. Tandy*, 39 Tex. 545. "Fraud ought not to be lightly imputed; the legal presumption is the other way." *Prevost v. Gratz*, 6 Wheat. 481; *The George*, 1 Wheat. 408; *Conrad v. Nicoll*, 4 Pet. 291; *United States v. Arredondo*, 6 Pet. 291; *Gregg v. Sayre*, 8 Pet. 244; *Tucker v. Moreland*, 10 Pet. 58; *Gaines v. Nicholson*, 9 How. 356; *Michaels v. Olmstead*, 14 Fed. 22. To justify the imputation of fraud the facts must be such as are not explicable on any other hypothesis. *Trust Co. v. Pettway*, 24 Ala. 544; *Morton v. Weaver*, 99 Pa. 47; *Mead v. Conroe*, 113 Pa. 220. Allegations of fraud should always be clearly proved, either directly or necessarily by circumstances which clearly lead the mind of the court to the conclusion that a fraud has been perpetrated. *Babbitt v. Dotten*, 14 Fed. 19.

The fact that the parties occupied the relation of divorced husband and wife does not in and of itself cast any suspicion upon the transaction. *Gottlieb v. Thatcher*, 151 U. S. 279.

*Mr. H. H. Glassie* for the appellee, Albert M. Ridenour.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

The object of the bill in this case is to establish a claim

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of the plaintiffs against Albert M. Ridenour, one of the defendants, and a nonresident of this District, and to have a certain deed of an interest in real estate, made by the said Albert M. Ridenour to Alice E. Ridenour, declared void as being intended to hinder, delay and defraud the creditors of the grantor, especially the plaintiffs. The deed bears date the 19th of August, 1895, and was filed for record on the 21st of September, 1895, and the present bill was filed on the 28th of September, 1895. The debt alleged to be due the plaintiffs is supposed to have accrued, as money had and received to their use by the defendant, Albert M. Ridenour, between June 23, 1894, and February 1, 1895. The claim is founded upon an alleged embezzlement of money by the said Albert M. Ridenour, while in the employ of the plaintiffs as their bookkeeper, between the dates mentioned. The case has been in this court on a former appeal by the plaintiffs, and upon a reversal of the order appealed from, the case was sent back for further proceedings (9 App. D. C. 95, 412); and after such further proceedings had, and a full hearing upon evidence, the bill was dismissed by the court below, and the plaintiffs have brought the case here on a second appeal. Both Albert M. Ridenour and Alice E. Ridenour are now, and have continued to be from a time anterior to the date of the deed, nonresidents of this District. The bill alleges that the defendant, Albert M. Ridenour, absconded or left this District to avoid prosecution or service of process upon him for his embezzlement or defalcation; and, consequently, no process could be served upon him in this jurisdiction to enable the plaintiffs to recover judgment upon their claim at law. It is further alleged that Albert M. and Alice E. Ridenour were formerly husband and wife, but, as the plaintiffs were informed, had been divorced prior to the time of making the deed, though, as plaintiffs believe, they had, notwithstanding the divorce, been cohabiting together as man and wife. It is further alleged that the conveyance of the real estate, which consisted of an equity of

redemption in an undivided one-fourth interest in a certain parcel of ground in this District, had been made without consideration, and with intent to hinder, delay and defraud the creditors of Albert M. Ridenour, particularly the plaintiffs, pursuant to a fraudulent scheme concocted between the parties to the deed.

The two defendants, Albert M. and Alice E. Ridenour, answered the bill separately, and they deny all the material allegations of the bill respecting the want of *bona fides* in the making of the deed by Albert M. to Alice E. Ridenour, and they aver that they had been absolutely divorced by a decree of the Circuit Court of Cook County, in the State of Illinois, passed on the 31st of August, 1893; and that, by said decree, Albert M. Ridenour was ordered and decreed to pay to said Alice E. Ridenour the sum of \$50 per month as permanent alimony; and that the arrears of alimony and the relinquishment of the future accumulations thereof, together with certain considerable sums of money, which had been, from time to time, loaned by Alice to Albert, formed the real and true consideration for the deed for the interest in the real estate conveyed. It is also utterly denied, by both defendants, that they had cohabited together as husband and wife since the divorce, and for some time before. And in the absence of clear and decisive proof of the fact, no presumption can be entertained in support of such allegation as that made by the bill.

Testimony was taken, and among the witnesses examined was Alice E. Ridenour; and her testimony has not been impeached, except as the circumstances of the case may afford grounds for suspicion as to the intent and purpose of the conveyance. Her testimony fully supports the defence set forth in her answer.

There are four principal questions presented by the pleadings and evidence. First, whether the proof establishes with sufficient clearness the existence of the claim set up by the plaintiffs against Albert M. Ridenour. Sec-

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only, whether the facts and circumstances of the case, as shown in proof, have sufficient probative force to impeach and overcome the *prima facie* effect of the deed from Albert M. Ridenour to Alice E. Ridenour. If not, third, whether the deed so made is an assignment for the benefit of creditors, such as is contemplated by the act of Congress of February 24, 1893, to prevent undue preferences; and, fourth, whether the certified copies of the decree of divorce and for alimony, and of the will of Mrs. Hall, bequeathing a sum of money to Alice E. Ridenour, and the receipt of the latter therefor, are so authenticated as to be admissible in evidence, for the purpose for which they were offered?

1. The proof in respect to the claim of the plaintiffs, considering the nature of the claim, and what it involves, as it affects the defendant, Albert M. Ridenour, apart from mere pecuniary considerations, and the circumstances under which it is made, is not beyond all question or doubt. But, without going into a critical examination of the evidence relied on to establish the claim, we shall, for the purposes of this case, assume that it is sufficiently established, and that the plaintiffs are, and were at the date of the deed in question, creditors of the grantor in the deed, as charged in the bill. And treating the debt as established, we shall proceed to consider the other questions we have stated.

2. The deed recites a money consideration paid of \$450, and this fact is much relied on as indicating the falsity of the transaction as between the parties to the deed. And if this was the only consideration for the conveyance, it would have great force as evidence to impeach the *bona fides* of the deed, as against the existing creditors of the grantor. The interest of the grantor in the property conveyed is shown to be more than three times the amount of the consideration stated in the deed. But the deed itself does not furnish the only evidence of the consideration upon which it was made. The testimony of the grantee shows that the real consideration was even more than the value of the interest

of the grantor in the property, as ascertained by judicial sale under a decree. This consideration for the deed, according to the testimony of the grantee, was made up of arrears for alimony, and for alimony to become due, together with certain sums of money loaned by the grantee to the grantor. It is insisted, however, that such additional or superadded consideration to that stated in the deed, is not allowable, and can not be shown to support the deed as against existing creditors of the grantor. But that contention is not supported by settled principle. By numerous cases cited it has been held, that although a mere nominal consideration be stated in the deed, as one or five dollars, yet the true consideration may be shown by parol evidence. The only requirement to the introduction of evidence of such additional or true consideration by parol is, that the true or superadded consideration, proved by parol, shall be of the same nature and kind as that stated in the deed, and not inconsistent therewith. *Hitz v. National Bank*, 111 U. S. 722; *Richardson v. Traver*, 112 U. S. 423, 431; *Shirras v. Craig*, 7 Cr. 34, 50; *Cunningham v. Dwyer*, 23 Md. 220; *Bullard v. Briggs*, 7 Pick. 533; 1 Greenl. Ev., Secs. 285, 304; Bump on Fraud. Conv. 596, and cases there cited. It is an admitted principle that a deed is valid in law with any valuable consideration, however small, but as inadequateness of consideration may be relied upon to prove, and is often very strong evidence of fraud, a party claiming under the deed may show that it was made upon another and a greater consideration than that which is expressed therein; and this is allowed to rebut the presumption of fraud which might arise from the apparent inadequate consideration expressed in the deed. *Bullard v. Briggs, supra.* And this additional consideration may consist either of money paid to the grantor, or to his creditors, or an indebtedness due to the grantee, or liability for the grantor, or other valuable consideration. And as to what constitutes a valuable consideration, especially in respect to an antecedent debt

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or liability, we may refer to the case of *Currie v. Misa*, L. R. 10 Exch. 153, a case in the Exchequer Chamber, where the opinion of the court was delivered by Mr. Justice Lush, and wherein the result of the authorities is stated to be, that "a valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other;" citing Com. Dig. Tit., Action on the Case, Assumpsit B. 1-15.

It is objected by the plaintiffs, and strongly urged in argument on their behalf, that what is attempted to be proved by Mrs. Ridenour, the grantee, as the true and additional consideration for the deed, to that stated on its face, is not sufficiently established to be accepted as reliable evidence; and, so far as the alleged additional consideration is made up of the arrears of alimony due, and of alimony to become due under the decree for divorce, such alimony does not, and from its nature could not, form any valid portion of the consideration for the deed. It is argued that alimony decreed to be paid is not a debt, and therefore Mrs. Ridenour was not a creditor of her late husband in respect of such alimony, decreed to be paid by him; and therefore the deed derives no support in respect of the alleged alimony that was included in the consideration therefor. But, in our opinion, this argument is rather more specious than sound. It is true, alimony awarded is not regarded as a debt in the strict technical sense of that term; but the decree of the court awarding alimony imposes a duty and an obligation upon the party against whom it is passed, and confers a benefit and a means of support upon the person in whose favor it is made. It is enforced as a judgment or decree (*Allen v. Allen*, 100 Mass. 373; *Tolman v. Leonard*, 6 App. D. C. 224); and if the parties happen to reside in different States, such judgment or decree is enforced by the courts of the United States. *Barber v. Barber*, 21 How. 582. And a judgment or decree for alimony, or a settlement in

lieu of alimony that would have been decreed, is not regarded as being in derogation of the rights of creditors of the party obligated to pay alimony, and therefore is not within the prohibition or prevention of the Stat. 13 Elizabeth. *Hobbs v. Hull*, 1 Cox Ch. 445. It is clear, we think, that the surrender of a claim for alimony due, or to become due, under a decree of a court, constitutes valuable consideration within the meaning of the law, as against the creditors of the party bound to pay such alimony.

If, therefore, the true and additional consideration for the deed be such as is testified to by Mrs. Ridenour, there can be no doubt there was a valuable and an adequate consideration as against the existing creditors of the grantor.

The gravamen of the bill, in the effort to reach the property conveyed by the deed, is the alleged or supposed fraud and collusion of the grantor and grantee to cheat and defraud the creditors of the former, and especially the plaintiffs; and this charge, and the presumption sought to be raised and maintained in respect to the conduct of the parties, are largely predicated of the fact of the former relations that existed between the grantor and grantee in the deed—that of husband and wife. But, as said by the late Mr. Justice Jackson, speaking for the Supreme Court of the United States, in the case of *Gottlieb v. Thatcher*, 151 U. S. 271, 279, “the relationship of the parties does not, of and in itself, cast suspicion upon the transaction, or create such a *prima facie* presumption against its validity as would require the court to hold it to be invalid *without proof* that there was fraud on the part of the grantor, *participated in by the grantee*. This proposition is so well settled that authorities need not be cited in its support.”

In this case, the *onus* of proof throughout is upon the plaintiffs. It is incumbent upon them, not only to establish their claim as charged against Albert M. Ridenour, including as it does the crime of embezzlement, to the entire satisfaction of the court, but to show by clear and indubit-

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able proof that the deed assailed is the offspring of the fraud and collusion of the grantor and grantee therein. The case cannot rest upon presumption merely, because fraud is never presumed; and in this case, while there may be circumstances to excite suspicion, there is not that clear and definite proof to overcome the *prima facie* validity of the deed, supported as it is by the positive testimony of the grantee, Mrs. Ridenour. She not only proves by her testimony an adequate valuable consideration for the deed, but she proves that she had not the slightest knowledge of the existence of the plaintiff's claim at the time she accepted the deed. If this be true, there is nothing to support this case, charging fraud and collusion as it does, as against the grantee in the deed, assuming the consideration of the deed to be valid.

The effort to impeach her veracity was simply abortive. The single witness examined upon that subject is a brother of the late husband of Mrs. Ridenour, and he seems to be actuated entirely by personal prejudice to the divorced wife of his brother; and while he says there was a family prejudice against the woman, he admits that he had never heard that her reputation for truth and veracity was bad; and that the subject of her truth and veracity he had never heard discussed. There is really no ground for rejecting her testimony. And that being so, the question is, not what Albert M. Ridenour may have intended, or what reasons may have influenced him in making the deed, whether to defeat the claim of the plaintiffs or not, if the grantee in the deed has done nothing improper to procure its execution, but only accepted the deed, upon adequate valuable consideration, in good faith. In such case, the deed is beyond impeachment by the creditors of the grantor. This is settled and fully illustrated, by the case of *Marbury v. Brooks*, 7 Wheat. 556, and S. C. 11 Wheat. 78. In that case, it was held, as it has been held in many prior and subsequent cases, that a debtor had the right to prefer one

creditor to another in payment, and his private motives for giving the preference can not affect the exercise of the right if the preferred creditor has done nothing improper to procure it. And the same principle was fully maintained, by the same court, in the case of *Prewitt v. Wilson*, 103 U. S. 22, where it was held that a conveyance for a valuable and adequate consideration will be upheld against the grantor's creditors, however fraudulent his purpose was, if the grantee had no knowledge of such fraudulent purpose. It is a principle of general application, that where a transfer is made to a creditor, or a person occupying the position of a creditor, his equity is as strong as that of others occupying a similar position, and he or she is entitled to the benefit of the general rule, that where the equities are equal the legal title must prevail. An existing indebtedness is, therefore, according to all authority, a good and valuable consideration for a conveyance within the proviso of the statute of Elizabeth, which saves the rights of *bona fide* purchasers. There being no equity prior or superior to that of the grantee in the deed, the necessity which calls for a new consideration in other cases does not exist. Bump, Fraud. Conv., pages 179, 183 and 186, and cases there cited; *Seymour v. Wilson*, 19 N. Y. 417; *Adams v. Wheeler*, 10 Pick. 199; *Hitz v. Nat. Bank*, 111 U. S. 722. This was the conclusion of the learned judge below, and we heartily agree with him.

3. But it is insisted, that though it be found that there is a sufficient valuable consideration for the deed, made up of the pre-existing liabilities of the grantor, yet the deed must be treated as a voluntary assignment for the benefit of the creditors of the grantor, within the act of Congress of February 24, 1893, declaring void all preferences of one creditor over another; and that the grantee in the deed holds the property conveyed as trustee for all the creditors of the grantor. But to this proposition we can not assent.

The act declares that every provision in any assignment

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thereafter made in the District of Columbia, for the payment of one debt or liability in preference to another, shall be void, and all debts and liabilities *within the provisions of the assignment* shall be paid *pro rata* from the assets thereof. The present is an absolute deed of conveyance, and there is nothing whatever to indicate an intention on the part of the grantor to create a trust for the payment of any particular debt or liability. It is well understood what meaning the law attaches to the terms "voluntary assignment for the benefit of creditor or creditors." It does not mean the making of an absolute conveyance of property directly to a creditor in payment and discharge of a pre-existing debt or liability, as a consideration therefor. While such a conveyance may have the effect of giving a preference to such creditor, it is not an assignment for the benefit of creditors within the meaning of the statute. If it were so, no debtor, in embarrassed circumstances, could devote his property to the payment of any particular creditor, if more than one, or create a lien or incumbrance in favor of a particular creditor, by mortgage or deed of trust. He might sell and convey his property to a stranger, and put the money in his pocket, but he could not convey it to a particular creditor in payment of an antecedent debt. It was certainly not the design of the statute to have any such effect, and statutes of the same import have not been so construed. *Nat. Bank of Chicago v. Bank of Kansas City*, 136 U. S. 223; *Walker v. Ross*, 150 Ill. 50; *Cissel v. Johnston*, 4 App. D. C. 345.

But in this case the plaintiffs have not treated the deed as a voluntary assignment for the benefit of a particular creditor under the act of Congress but they treat and proceed against the deed in their bill, as a conveyance made to hinder, delay and defraud creditors, under the Statute of Elizabeth; and they must stand by the case as they have presented it.

4. It remains to consider the question raised by the plaintiff's objection to the admissibility in evidence of the copy

of the will of Mrs. Fannie Hall, under which Mrs. Ridenour derived a legacy of \$3,000, and the receipt given therefor to the executor; and also to the copy of the decree of the Circuit Court of Cook County, in the State of Illinois, granting a final and absolute divorce to Mrs. Ridenour, from Albert M. Ridenour, dated the 31st of August, 1893, and awarding to the former permanent alimony of \$50 per month from the 1st of September, 1893. The ground of objection to the admissibility of these documents, though certified under the seals of the respective courts, is that they are not formally authenticated as required by the act of Congress.

Neither of the documents objected to was put in issue by the pleadings in the cause. Indeed, the fact of the divorce was virtually conceded by the bill; but the plaintiffs alleged that the parties had subsequently cohabited together as man and wife. The documents were simply referred to and exhibited in support and corroboration of the testimony of Mrs. Ridenour, to show the extent of her means, and what constituted the consideration for the deed. For such purpose we think they were admissible; and clearly so under the Maryland statute of 1785, Ch. 46, Secs. 1 and 2, that statute being in force in this District. Ab. Comp. Stat. D. C., p. 220. These documents are sufficiently authenticated under the Maryland statute just referred to; and it is well settled that the method of authentication prescribed by the act of Congress of 1790 is *not exclusive* of any other which the States may think proper to adopt. 1 Greenl. Ev., Sec. 505. Upon the question of the applicability of the act of Congress, see the case of *Turnbull v. Payson*, 95 U. S. 418, 423.

In the case of the decree for divorce and alimony, the whole record, including pleadings and depositions, is not given, but only the decree, reciting the proceedings upon which it was founded; and this omission of the pleadings and depositions is made ground of objection to the admissibility of the certified copy of the decree. But looking to the purpose for which the decree was offered we think the

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objection is not well founded. It was not offered to operate as an estoppel, but only by way of explanation and as corroborative of the witness. In Buller's N. P., p. 235, it is laid down as law, that "if a party wants to avail himself of the decree only, and not of the answer or depositions, the decree being under the seal of the court and enrolled, may be given in evidence without producing the bill and answer, and the opposite party will be at liberty to show that the point in issue there was not *ad idem* with the present issue." See also the case of *Trotter v. Blake*, 2 Mod. 231. And in 1 Starkie on Evidence, part 2, Sec. 87 (Metc. Ed.), p. 246, it is said that "a sentence of the spiritual court of a divorce *a mensa et thoro*, has been received as evidence without proving the libel and other proceedings." And so a copy of a will engrossed under the seal of the ordinary, with certificate of its having been proved and admitted to probate, will be received. 3 Bac. Ab., Tit. Executor; Bul. N. P. 245, 246. But if the party desires to prove the facts upon which the decree or sentence was founded, or relies upon the decree or sentence as an estoppel, he must produce the bill, or libel, and answer, and all other proceedings that made up the record.

Finding no error, we shall affirm the decree of the court below; and it is so ordered.

*Decree affirmed.*

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STEVENS v. SEHER.

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PATENTS; RECORD ON APPEAL; COSTS; INTERFERENCES; PRELIMINARY STATEMENT, AMENDMENT OF; REDUCTION TO PRACTICE; DESCRIPTION IN PATENT.

1. Where on appeal from a decision of the Commissioner of Patents a record was allowed to be filed in the case by appellee upon assurance that it would have some material bearing upon the question of the issue presented by the appellee, but on consideration it was found that the record had no such

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bearing, *held*, that the record so introduced must be at the cost of the appellee.

2. It is of the utmost importance that strictness be observed as to the dates furnished in preliminary statements required in cases of interferences, for if parties were allowed to vary their dates at pleasure as to the time of discovery, invention, or disclosure, it would inevitably lead to the imputation of deception and bad faith practiced on the part of the party so changing his dates.
3. If any material error occurs in the preliminary statements, or other statements made to the office, through inadvertence or mistake, the statement may be corrected on motion upon showing to the satisfaction of the Commissioners that the correction is essential to the ends of justice, and the motion to correct the statement must be made, if possible, before the taking of any testimony and as soon as practicable after the discovery of the error. It is only upon complying with this rule that the correction of any material error in preliminary statements can be made.
4. On the proof, *held*, that the claim of Seher is not sufficiently and definitely established to maintain his patent, it having, as it can have, only *prima facie* effect; that he has failed to show that he has fully and completely established by experimental tests so as to enable persons reasonably skilled in the science of chemistry to determine whether or not the composition made and claimed by him as new and valuable in the arts really possesses those properties which he claims as the essential character as an operative means, for no invention or discovery in such case as the present can be regarded as complete until such tests have been applied and have been successfully maintained.
5. In a case like the present the patent should state and fully disclose the component parts of the composition claimed with clearness and precision and not leave a person attempting to use the discovery to find it out by experiment. If the description be so vague and uncertain that no one can tell with certainty, except by independent experiment, how to apply the discovery and what exact result may be expected therefrom, the patent is void.
6. The decision of the Acting Commissioner of Patents in awarding priority to Seher *reversed*.

No. 54. Patent Appeals. Submitted January 14, 1897. Decided October 4, 1897.

HEARING on an appeal from a decision of the Commissioner of Patents in an interference proceeding between an applicant and a prior patentee. *Reversed*.

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The facts are sufficiently stated in the opinion.

*Messrs. Betts, Hyde & Betts* for the appellants.

*Mr. Anthony Gref* and *Mr. Edwin H. Brown* for the appellee.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

This case is brought here by an appeal from the Commissioner of Patents. The appeal is taken by John H. Stevens and the Celluloid Company, as assignee, from the decision of the Acting Commissioner of Patents in a matter of alleged interference of the claim of the appellant Stevens with an existing patent granted to the appellee, August Seher, relating to certain solvents of pyroxyline. The issue of the interference, as defined in the Patent Office, is as follows:

"A pyroxyline compound consisting of pyroxyline and one or more members of the group of herein-described ketone solvents."

This issue constitutes the second claim of the appellant and involves his first claim, as made in his specifications, and it also involves the first and second claims of an application of Walter D. Field for a patent for pyroxyline solution or compound, and the claim in Patent No. 470,451, granted to August Seher, the appellee, for the manufacture of compounds of pyroxyline.

The Field claim is not involved on this appeal. There was no attempt to support that claim to priority by proof, and Field has not joined in this appeal and has not had his record printed. His claim must therefore be considered as withdrawn, at least so far as this appeal is concerned. The record of the case of Field's application was, upon the motion of Seher, the appellee, allowed to be filed in this case, upon the assurance of counsel that it would appear to have some material bearing upon the question of the issue presented by this appeal; but that record would seem to have no material

relation to the question here involved, and the record thus introduced must therefore be at the cost of the appellee.

Before proceeding to consider the main question of the appeal, that of priority of discovery, there is a question of practice of the Patent Office presented and insisted upon that is proper to be noticed, because of its great importance, as it may affect the integrity and good faith of the proceedings of the Patent Office and the interest of the public.

To state fully this question of practice, it may be proper to state the course of proceeding as it occurred in the Patent Office in this case, and this can be best done by stating such course of proceeding in the language of the Acting Commissioner of Patents. He says, in the final opinion in that office, stating the facts of the case, that—

“The interference was originally declared July 25, 1892, between the application of Stevens and the patent of Seher. The time for filing preliminary statements was fixed for August 16, 1892. Stevens filed a statement August 6, 1892, and Seher August 15, 1892. Both statements were opened August 20, 1892, and both were immediately sealed against inspection, and on August 22, 1892, a letter was written to each party calling for an amended preliminary statement, in view of certain defects in the original, on or before September 7, 1892. On that day Seher filed an amended statement. On September 10, 1892, Seher's second statement was opened and immediately sealed against inspection, and a letter calling for an additional amended statement and extending the time for filing such statement to September 28, 1892, was sent to Seher. On the same day another letter was sent to Stevens, notifying him of that extension. September 16, 1892, the primary examiner requested a suspension of the interference for the purpose of adding a new party—Field. The interference was suspended September 17, 1892, and redeclared October 7, 1892. The time for filing statements was fixed in the new notices for November

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2, 1892. Seher and Field filed their statements November 1, and Stevens filed no further statement, but relied upon the one filed August 6, notwithstanding the objections made to it by the examiner of interferences and the restrictions which, in view of such objections, it imposed upon him (Stevens) as to the date of conception and disclosure. In his first and second statements Seher gave as the date of his disclosure September 15, 1890. In his third statement the date of disclosure was given as 'on or about the 15th day of August, 1889.' Stevens was restricted by the examiner of interferences to January, 1890, as to conception and disclosure.

"Counsel for Stevens contends that Seher should be restricted to September 15, 1890, as the date of his disclosure, and a motion to strike out Seher's third statement was made by Stevens at the hearing, notice of his intention to make such motion having been given orally before the taking of any testimony, and also on March 13, 1895, in writing. He states in his brief that 'it does not seem equitable or just that he (Seher) should be allowed to alter these dates and make a difference of nearly a year in his favor in his third statement after he or his attorneys or his attorneys' correspondents in Washington had an opportunity of inspecting the preliminary statement of his adversary, and there is nothing in the testimony to repel the presumption that when the third preliminary statement of Seher's was filed he or his attorneys had at least some information of the dates given by Stevens in his preliminary statement.'

"Seher contends that the motion should not be entertained, because he gave notice to Stevens that unless such motion was brought before any testimony was taken he would consider the objection to his third statement waived. His attorney has also stated that at the time he first discovered the error in his first and second statements the interference had been suspended, and that he could not therefore bring a motion to correct such error, and that when another party was added the interference became a new interference. His

third contention is that 'neither Seher nor . . . any one in any way connected with Seher had any knowledge or information whatsoever of the contents of Stevens' preliminary statement.'

"The examiner of interferences adjudicated priority in favor of Stevens, and stated in his decision that 'the conclusion herein reached renders it unnecessary to pass upon Stevens' motion to strike out the third preliminary statement filed by Seher.'" "This," says the Acting Commissioner, "would have been good practice had the examiner of interferences been the final tribunal, but under the circumstances it would have been better to have passed that motion. The examiners-in-chief sustained the examiner of interferences, and hence there was no direct need for them to consider this question, and in fact their decision contains no reference to it. There may be no necessity for the Commissioner to decide the question, and again it may be of vital importance; for, if admitted, the statement changes the chronological relation of Seher and Stevens as to alleged disclosure. The best and strictest practice," says the Acting Commissioner, "would require me to remand the case to the examiner of interferences for consideration of this question, with permission for the usual recourse by appeal, and Seher's counsel should then have insisted upon the determination of this question by the examiner of interferences before his first appeal. The examiners-in-chief, if they had considered the question one over which they had jurisdiction, might have remanded the case before their decision. Since, however, Stevens' motion was brought too late (Rule 113), and since at no time prior to the approval of the final statements of the three parties was the statement of either of the others open to any of them under Rule 108, I shall admit Seher's third statement without remanding the case back to the examiner of interferences."

It thus appears that both the examiner of interferences and the board of examiners-in-chief decided the question

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of priority in favor of Stevens, without regard to the change of date of disclosure set up by Seher in his third preliminary statement, interjected into the case without authority. These two tribunals did not regard the change of date as being material in passing upon the question of priority, and hence they attached no importance to it.

Treating the new date insisted upon by Seher as properly in the case, they decided against him upon the facts in the case; but on appeal to the Commissioner, and when a different view of the facts was taken, the question of the change of dates in the preliminary statement of Seher became of prime importance. It was then that the right of Stevens under his motion to strike out the third preliminary statement of Seher became material to be considered; but that motion the Acting Commissioner overruled, and admitted Seher's third statement without remanding the case back to the examiner of interferences; and in thus ruling we think the Acting Commissioner erred, and if there was nothing else in the case on which to predicate error, we should reverse the decision and remand the case, that regular proceeding should be observed and maintained. It is of the utmost importance that strictness be observed as to the dates furnished in preliminary statements required in cases of interferences, for if parties were allowed to vary their dates at pleasure as to the time of discovery, invention, or disclosure, it would inevitably lead to the imputation of deception and bad faith practiced on the part of the party so changing his dates. If any material error occurs in the preliminary statements made to the office, *through inadvertence or mistake*, the statement may be corrected on motion, *upon showing to the satisfaction of the Commissioner that the correction is essential to the ends of justice*; and the motion to correct the statement must be made, if possible, before the taking of any testimony, and as soon as practicable after the discovery of the error. (Rule P. O. 113.) It is only upon complying with this rule that the correction of any material error in pre-

liminary statements can be made. That rule was wholly ignored in this case in respect to the third statement of Seher.

But there is other ground for the reversal of the decision appealed from, besides the matter of practice just referred to, involving the merits of the case.

The application of Seher, upon which his patent issued was filed December 23, 1891, and the patent thereon was issued March 8, 1892. The discovery for which the patent issued is described therein as, first, that certain ketones described are individual solvents of pyroxyline; second, that a mixture of any two or more of them is a solvent of pyroxyline; and, third, that a mixture of any one of them with any then known direct or indirect solvent of pyroxyline is a solvent of pyroxyline. The claim, as broadly asserted by the patent, is as for "an improvement in the manufacture of pyroxyline or nitrocellulose, the solvents propion, butyron, valeron, caprone, methyl-ethyl ketone (acetyl-ethyl), methyl-propyl ketone, methyl-butyl ketone, methyl-valeral, ethyl-butyl ketone, and methyl-amyl ketone, as and in the manner specified."

The application of Stevens was filed May 11, 1892, more than two months after the issue of the patent to Seher; but the specifications of Stevens would appear fully to cover the alleged discovery described in Seher's patent; and we may suppose that the specifications of Stevens were intended to raise an issue of interference with that patent.

In his application Stevens states that his improvements are applicable to the manufacture of the entire class of materials which are well known in trade as pyroxyline compounds; and the distinctive novelty of his invention or discovery he states to be the employment, in combination with pyroxyline, of *certain substances which he had discovered to possess the property of dissolving or of aiding the conversion of the pyroxyline into a condition suitable for applications in commerce or the arts.* And after referring to previous patents

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obtained by him for solvents of pyroxyline, he proceeds to state that it is the object of his present invention to still further extend the list of substances which can be employed to dissolve or convert pyroxyline, or form with it useful combinations, and it is based upon a series of experiments in which he had demonstrated that *certain liquid members of the fatty-acid group of "ketones"* are useful solvents of pyroxyline, and can be employed in various ways, some of which are hereinafter described, in the manufacture of pyroxyline compounds for practical use. He distinguishes these members of the fatty-acid group of ketones from acetone, known as a practical solvent of pyroxyline, and he furnishes a list of the more prominent group of solvents, consisting of the simple ketones and of the compound ketones, acting as solvents of pyroxyline, all of which, he says, are known to chemistry as ketones derived from fatty acids, corresponding to the monohydric alcohols. He has furnished quite a full exposition of his methods of discovery of ketones in his application and preliminary statement.

There is really no great diversity of facts or complication shown in the proof; but the question would seem to be one rather of the construction of facts and the proper conclusion to be drawn therefrom. The examiner of interferences has furnished a very clear and fair summary of the evidence, showing the methods of experimental investigation of the parties in making their discoveries, and how they arrived at the results. And as we agree in his reasoning and conclusions, we can not do better than adopt his summary of the evidence. He says:

"In his preliminary statement Stevens alleges conception in January, 1890, and reduction to practice in June and July, 1890. In the testimony offered in support of his claim of priority the date of conception is fixed as of November 8, 1889, but under the well-settled practice he can not be accorded an earlier date than that set up in his preliminary statement. It appears that on November 8, 1889,

Stevens dictated to Mr. Axtell, a chemist in the employ of the Celluloid Manufacturing Co., the memorandum in evidence as 'Axtell memorandum,' wherein Axtell is instructed to produce members of the 'acetone family,' other than acetone itself, in order 'to further extend the list of useful solvents' of pyroxyline. On March 13, 1890, under instructions from Stevens, Axtell gave an order to Merck & Co., wholesale dealers in chemicals in New York City, for a large number of substances, among which were several of the ketones embraced within the limits of this controversy, viz., butyron (dipropyl ketone), di-ethyl ketone, methyl-ethyl ketone, methyl-hexyl ketone, methyl-propyl ketone, and valeron. Being unable at this time to procure these ketones—and in fact they were not received until December, 1890—Axtell, in June and July, 1890, proceeded to carry out the instructions of Stevens to produce the ketones and to examine them for solvent properties. Mr. Stevens was absent from this country from June 14, 1890, until late in the fall, and during his absence, in June and July, Axtell, as shown by his memorandum made on July 16, 1890, had succeeded in making valeron, propion, butyron, suberone, and phorone, and also some of the compound ketones resulting from the distillation of the fatty-acid salts of barium and calcium. He further states that he produced at this time the members of the group beginning with acetone or di-methyl ketone to methyl-nonyl ketone and from di-ethyl ketone (propion) to ethyl-nonyl ketone. These were tested at this time and found to be solvents of pyroxyline.

"Upon the return of Stevens from abroad, in the latter part of 1890, he personally took up the study of the ketones of the fatty-acid group, the results of which are shown in his memoranda of February 8, 1891. Being, as he states, extreme busy, he was unable to take up the subject again until April, 1892, when an elaborate series of experiments were conducted with a large number of the members of the

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series which he had not before personally examined. The result of these experiments appears in Stevens' Record, pp. 88 to 107. Stevens is, however, entitled to carry the date of his discovery of the solvent properties of the ketones of the fatty-acid group higher than acetone—back to the investigations of Axtell in June and July, 1890. The idea that was original with Stevens was communicated to Axtell who carried out the instructions given, produced some of the members of the group of ketones suggested by Stevens, and by tests demonstrated their powers as solvents of pyroxyline. The record of Stevens presented in this case shows that prior to the filing of his application the ketones to which this controversy is limited had been thoroughly and exhaustively studied, and that he possesses a complete and comprehensive knowledge of the whole matter.

“In strong contrast to the case presented by Stevens stands that of Seher. He filed his application for patent December 28, 1891, and admits that he never tried a single one of the substances claimed by him in his patent to determine its property as a solvent of pyroxyline and can not state positively that he has ever seen any one of them. In view of this admission, the case of Seher is confined within comparatively narrow limits. The position taken on his behalf is that he used as a solvent of pyroxyline a certain oily liquid obtained in the distillation of wood alcohol, and also a portion of the distillate *arising from the distillation* of crude acetate of lime. It is contended that these bodies contained *only* the ketones named by Seher in his patent, and that when he used them to dissolve pyroxyline it followed as a matter of course that he made the invention in issue and reduced it to practice.

“In 1883 Seher was in the employ of Charles Cooper & Co., manufacturing chemists, Newark, N. J. At that time he was making acetone from wood alcohol, and the substance which he alleges he found to be a solvent of pyroxyline was an oily liquid passing over in the distillation of

the wood alcohol a little below 100° C., at which point the distillation was stopped. A small portion of this oily liquid he took to his home and after dehydrating (?) submitted it to distillation, using the distillate in his experiments. He states that the largest amount passed over between 95° and 140° C. Nothing further was done with this oily liquid until after August, 1887, as he considered it of no importance, and then it was, as he alleges, that he discovered that it consisted of ketones. He determined this by the fact 'that with the alkaline solution of iodine they would yield iodoform, and that with a dilute solution of hypochlorite of lime they would yield chloroform.' But it is a known fact, and Seher admits, that the iodoform and chloroform tests are in nowise indicative of the precise nature of this substance, much less that the product obtained by him contained nothing but the ketones named in his patent. There was no fractional separation and no analysis of any kind made to determine what this substance contained, and no definite information is given even of the boiling-point of the distillate that he used. In the absence of such proof and from the further fact that there is no corroboration of Seher as to anything alleged to have been done by him, and his own testimony was given solely from memory and after a lapse of ten years, it can not be found as a fact that the solvent power of this 1883 product was due *exclusively* to the ketones named in his patent, or that Seher had any knowledge that such was the fact.

"The next step taken by Seher in connection with the ketones of the issue was in 1887, when it is alleged he obtained a solvent containing such ketones by the destructive distillation of crude acetate of lime. This fact, however, if proved, can have no earlier date than that named in his preliminary statement, to wit, August 16, 1889. Seher was familiar at this time with the process described in the patent to Michaelis, No. 322,194, of July 14, 1885, for the manufacture of chloroform and of purified acetates, and he testi-

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fies that he was experimenting with this process to determine the yield of acetone in order to produce chloroform. In the spring of 1887 he distilled a few pounds of crude acetate of lime, the several products being run over and collected together, which distillate he sent to Dr. Simon, a chemist in the employ of Cooper & Co., to be subjected to a fractional distillation in order to ascertain the yield of acetone. Dr. Simon testifies that he fractionated this substance and found that a part of it was acetone, but that the greater part had a boiling-point much higher than acetone. These fractions were put into bottles and labeled and delivered to the office. Seher states that he obtained these fractions, poured the liquids together, except the acetone, and put in some pyroxyline and found that it was dissolved.

"The witnesses Amend and Jarrett are brought forward to corroborate Seher in his allegation that he had this solvent in 1887, but their testimony proves nothing. They have no knowledge of their own as to what the substance was that it is claimed was shown them, and they admit that all they know about its constitution is what was told them by Seher. Amend's test of rubbing some of the liquid on the hand and smelling is of as little value as the iodoform and chloroform tests.

"Nothing more seems to have been done by Seher until a visit of Dr. Waldstein, *some time in 1889*, the precise date of which is in doubt. However, all that occurred at the time of this visit was the exhibition by Seher to Waldstein of a substance which the former said he had produced by the dry distillation of crude acetate of lime. The matter was not again reverted to until some time after August, 1890, when Waldstein's firm purchased an interest in Seher's factory, after which time it is alleged a large number of distillations were made. This, however, was subsequent to the date of Axtell's investigations.

"The difficulty with the testimony on behalf of Seher is that it is too vague and indefinite and lacks that exact in-

formation which is of such importance when dealing with an art of this nature. Taking the evidence together, it falls far short of establishing the fact that the solvent which Seher had made consisted *exclusively* of ketones of this group higher than acetone, as the whole case rests upon oral testimony given after the lapse of several years and unsupported by a single note or memorandum of anything that is alleged to have been done. Dr. Simon, who made the fractional distillation in 1887, has no recollection of the number of fractions or even of the boiling-point of any one of them. Seher is equally as ignorant of these matters. He made no analysis of this substance and never became aware of its constituents.

"The only attempt at identification of this distillate was the iodoform and chloroform tests; but the fact that chloroform and iodoform can be made does not prove that the distillate contained ketones exclusively, much less that it contained nothing but the ketones named in Seher's patent.

"While it is undoubtedly true that by the dry distillation of crude acetate of lime Seher would obtain some, if not all, of the ketones named in his patent, it is equally true that he would obtain also other bodies. Thus acetone, the lowest member of this particular group, a powerful and well-known solvent of pyroxyline, is present in such distillate, and the naked allegation of Seher that he employed his solvent free of acetone can hardly be accepted as conclusive of the fact when we recall Simon's testimony, and the circumstances under which Seher testified, and the further fact that Seher never made any test to determine that the distillate was free of acetone; also Dr. Waldstein's testimony that he determined that no acetone was present by boiling some with a thermometer has no weight in view of the fact that he gives no information upon which he bases such a conclusion. Merely heating to the boiling-point of acetone, if this is what he did, would not remove all the acetone.

"Again, the distillate obtained by Seher undoubtedly con-

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tained aldehydes, some of which respond to the iodoform and chloroform tests and which Dr. Waldstein claims are solvents of pyroxyline; but there is no evidence that these were removed, and hence it can not be said with certainty that the solvent action was due to the ketones higher than acetone, a small number of which Seher has named in his patent. This was the thing to be determined, assuming Seher's contention to be the correct one, not that some compound body obtained in the manner stated by him, of whose precise composition he was ignorant, was a solvent of pyroxyline.

"The examiner can not give his assent to the contention of Seher, that even if he had discovered that the product arising from the destructive distillation of crude acetate of lime was a solvent of pyroxyline that he thereby discovered that the ketones named in his patent *alone* were solvents. Seher has made no analysis of such substance and no separate tests of the solvent power of any of his named ketones. The discovery that such a compound body was a solvent does not justify the conclusion that each constituent of that body is a solvent, for the solvent power of the mixture might be due to certain ones and not to others, or to other constituents of whose presence he was ignorant, or to a certain mixture of two or more. One member of a group may be a solvent, and the next one, or one closely allied, not, an example of which is furnished by methyl and ethyl alcohol. The former is a solvent of pyroxyline and the latter is not.

"It was through Dr. Waldstein that Seher filed his application for patent. The former prepared the specification in December, 1891, and as he had never examined the product that had been obtained by the distillation of crude acetate of lime he resorted to Fehling's 'Handwörterbuch der Chemie' for a list of ketones which he assumed would or ought to be present, and in so doing included methyl-valeral among the list, which is an aldehyde and not a ketone.

"Upon a review of the whole record the examiner feels justified in holding that Seher did not make the discovery that the ketones of the fatty-acid group higher than acetone are solvents of pyroxyline, at least prior to the date which has been accorded Stevens. The latter has fully sustained the burden upon him and is justly entitled to a patent, notwithstanding the grant to Seher."

On appeal to the board of examiners-in-chief that tribunal, upon full examination of the evidence, concluded with the examiner of interferences that "a discovery in the useful arts can not be made by conjecture, assumption, or reasoning; that it can only be attained by an accomplished fact. That it must be a discovery not of the mind, but by the actual use of physical means to develop a physical result. That the testimony had disclosed that Seher never made the discovery or discoveries set forth and claimed in his patent; and that Stevens made each and all of them, and is not merely the prior inventor of them, but is the first and only inventor of them."

From this decision Seher appealed to the Commissioner of Patents, and the Acting Commissioner reversed the decision and adjudged priority to Seher, and from which latter decision Stevens has appealed to this court.

The Acting Commissioner says that he has assumed that the statements made by the parties are true; that the statements made by Stevens are corroborated quite fully, and that there had been no very serious effort made to discredit the statements of Seher, and that such effort as had been made did not amount to a warrant for throwing any of them out, especially in view of Seher's position as patentee prior to the filing of Stevens's application.

The Acting Commissioner then proceeds to state the grounds of his dissent from the decisions of the examiner of interferences and of the examiners-in-chief. He says:

"Stevens asserts that Seher never made the invention for which he obtained a patent, and this is really the whole

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question to be considered. There can be no reasonable doubt," says the Acting Commissioner, "but that Seher conceived substantially the solvent of the issue before Stevens, and the question is, whether what he did with it amounts to a reduction to practice anterior to Stevens's exhaustive researches. Neither Seher nor Waldstein, however, ever actually produced an individual ketone, and as such tried it as a solvent. It is true that Mr. Simon appears to have made a fractionation of the distillate from commercial acetate of lime sometime in 1887, but this fractionation, which was made before the date of Seher's alleged disclosure, was not carried so far, apparently, as to separate out the individual ketones, and these fractions were not tried by Seher separately, but were poured together, and with the resultant mixture Seher made a test for dissolving pyroxyline.

"Seher never tried any individual ketones as solvents. He never deliberately and definitely tried any two or more, although he certainly tried mixtures of them. Stevens tested numbers of them individually, and tested some in combination with other solvents; but that he tested all possible combinations of these ketones with each other, and with other solvents, is not stated, and would be, in fact, entirely improbable.

"These two men" says the Acting Commissioner, "approached the question of dissolving pyroxyline from different points. Seher was trying to get a cheap and efficient solvent, no matter what it was. Stevens was trying to ascertain how many solvents he could discover, and the characteristics of all such solvents. One approached the question with the instincts of a business man, the other with the instincts of a scientist. Seher's discovery was in a measure accidental; Stevens's, the inevitable result of an exhaustive system of experiments. One took a comparatively cheap material—crude acetate of lime—for the source of his solvent; the other tried expensive and little known chemicals, but neither ever made a complete reduction to practice of

the issue in the sense of having made solutions of pyroxyline in ketones in all the variations possible under it.

"Stevens states that he reduced the invention to practice in June and July, 1890. At that time he was in Europe, but Mr. Axtell, from June 20 to July 15, acting under his direction, produced 'various ethereal liquids which are strong solvents of soluble pyroxyline.' These liquids he identified with more or less certainty, and they were obtained by 'distilling various mixtures of the fatty-acid salts of barium and calcium.' Seher had previously distilled such a salt and had produced at least one such solvent, but had not established by analysis or fractionation the composition of said solvent.

"I can not agree," says the Acting Commissioner, "with the statement of the examiners-in-chief that Seher never made the disclosure set forth and claimed in his patent, and I can not reconcile this statement with the presumption, which necessarily follows therefrom, that Stevens did make all the discoveries possible under his claim. Seher discovered a solvent for pyroxyline. That solvent is the one covered by the issue. He did not by chemical analysis show absolutely the composition of such solvent, but from tests which he and others made, and from consultation with authorities, he came to a reasonably accurate knowledge of its character. That he was aware of the whole scope of his discovery does not seem probable, but he was in a position earlier than Stevens to give to the world the essential features of the issue to an extent sufficient to meet the requirements of practical working, and the progress of science and the useful arts is promoted effectively when an inventor meets such requirements."

He therefore reversed the decision of the examiners-in-chief, and adjudged priority in favor of Seher;—holding that Seher had discovered and disclosed his invention prior to June or July, 1890, the time when it is conceded Stevens had completed and reduced to practice the invention or

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discovery of the issue, and which time was prior to the date of Seher's application for his patent. The patent has only *prima facie* effect on this interference, and is subject to be rebutted.

But on the facts taken as true by the Acting Commissioner, we think the conclusion reached by him should have been the reverse of what it was. It is clear, we think, that, on the proof, the claim of Seher is not sufficiently and definitely established to maintain his patent,—it having, as it can have, only *prima facie* effect; that he has failed to show that he has fully and completely established by experimental tests, so as to enable persons reasonably skilled in the science of chemistry to determine whether or not the composition made and claimed by him as new and valuable in the arts really possesses those properties which he claims as the essential character as an operative means; for no invention or discovery in such case as the present can be regarded as complete until such tests have been applied and have been successfully maintained. Rob. on Pats., Sec. 198. This is a principle settled and insisted upon in all the cases. In a case like the present, the patent should state and fully disclose the component parts of the composition claimed with clearness and precision, and not leave a person attempting to use the discovery to find it out by experiment. If the description be so vague and uncertain that no one can tell with certainty, except by independent experiment, how to apply the discovery and what exact result may be expected therefrom, the patent is void. *Wood v. Underhill*, 5 How. 1, 5; *Tyler v. Boston*, 7 Wall. 327, 330; *The Incandescent Lamp Patent*, 159 U. S. 465, 474–5.

We entirely agree with the Acting Commissioner that, upon the evidence, it is clear, neither Seher nor Waldstein *ever actually produced an individual ketone, and as such tried it as a solvent*. The fractionation made by Simon of the distillate from commercial acetate of lime was not carried so far as to separate out the individual ketones; and such fractions were

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not tried by Seher separately, but were poured together, and with the resultant mixture Seher made a test for dissolving pyroxyline. As said by the Acting Commissioner, Seher never tried any individual ketones as solvents. He never deliberately and definitely tried any two or more, although he did try mixtures of them. Seher never did by chemical analysis show with positive certainty *the composition of any such solvent as he supposed he had discovered, and the relative component parts thereof*, but he arrived at his conclusion by what he supposed to be a reasonable deduction from the experiments that he had made. This is not sufficient.

Concurring fully with the reasoning and conclusion of both the examiner of interferences and the examiners-in-chief, we must dissent from the conclusion of the acting Commissioner, and therefore reverse the decision appealed from.

The clerk of this court will certify this opinion and the proceedings in the cause to the Commissioner of Patents, to be entered of record in his office, according to law; and it is so ordered.

*Ruling appealed from reversed.*

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MERGENTHALER v. SCUDDER.

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SAME v. SAME.

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PATENTS; INTERFERENCES; PRIORITY OF INVENTION; CONCEPTION,  
PROOF OF; DRAWINGS.

1. A complete conception as defined in an issue of priority of invention is matter of fact and must be clearly established by proof. The conception of the invention consists in the complete performance of the mental part of the inventive act. All that

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remains to be accomplished in order to perfect the act or instrument belongs to the department of construction, not invention. It is therefore the formation in the mind of the inventor of a definite and permanent idea of the complete and operative invention as it is thereafter to be applied in practice that constitutes an available conception within the meaning of the patent law.

2. The date of the conception is the date when the idea of means, including all the essential attributes of the invention, becomes so clearly defined in the mind of the inventor as to be capable of exterior expression, and it is settled both by practice and express decision that such exterior expression of the mind of the inventor when relating to machinery may be by exhibits either in the form of drawings or by model, so as to lay the foundation of a claim to priority, if thereby the invention be made sufficiently plain to enable those skilled in the art to understand it.
3. The fact of conception by an inventor, for the purpose of establishing priority, can not be proved by his mere allegation nor by his unsupported testimony where there has been no disclosure to others or embodiment of the invention in some clearly perceptible form, such as drawings or model, with sufficient proof of identity in point of time.
4. Any full and accurate description of the invention, either in words or drawings or by model, if it be of a machine, or even an unsuccessful effort to embody the conception, when the effort discloses that the idea was complete, will suffice, although the attempt to represent it may have failed. In the absence of all other proof the date of the application for a patent, if containing a complete description, is taken as the date of the conception.
5. If drawings be exhibited and relied on as evidence of the conception of the invention, they must show a complete conception, free from ambiguity or doubt, and such as would enable the inventor or others skilled in the art to reduce the conception to practice without any further exercise of inventive skill.
6. Where drawings are in many essential particulars defective and wanting in completeness as means of showing and illustrating an invention involved in interference, such defects and want of completeness in the drawings can not be aided and the defective drawings made effective by construction or by reference to the prior state of the art.
7. Where an inventor has undertaken to invent and construct a machine essentially different from preexisting machines and not simply a mere improvement upon previous inventions, it is necessary for him to furnish such full, clear, and definite

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drawings of his invention to prove conception as will enable any person skilled in the art of construction of such machines to reduce the invention to practical form.

Nos. 59 and 60. Patent Appeals. Submitted January 20, 1897. Decided October 4, 1897.

HEARING on appeals from decisions of the Commissioner of Patents in interference proceedings. *Reversed.*

The COURT in its opinion stated the case as follows:

These appeals are from decisions of the Commissioner of Patents, and they present questions of interference, adjudged to exist between applications for patents for line-casting machines; two of the applications having been filed by Ottmar Mergenthaler, the senior party, and one by Wilbur S. Scudder, the junior party, as the alleged inventors. The interferences, while separately declared, are closely related to each other, and have, in all stages of the proceeding, been treated as one case. We shall so treat them on these appeals.

These interference cases are numbered, respectively, 16,233 and 16,270; and the two separate applications by Mergenthaler stand numbered 375,632, and 391,702, the first of which was filed December 23, 1890, and the second May 5, 1891; and the one application by Scudder was filed September 14, 1892, and is No. 445,900.

The issues, as framed by the Patent Office, on the first of the applications of Mergenthaler, as senior party, with the subsequent application of Scudder, are in two counts, and are as follows:

"1. The combination in a line-casting machine having suitable operating mechanism, of a series of matrices constructed to be assembled side by side in different orders to form the impression line, each matrix having several different characters less in number than the assortment used in the machine, the characters being independently usable.

"2. In a line-casting machine, the combination of a series

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of matrices each bearing several distinct characters, and mechanism for selecting and conducting the matrices to a place of assemblage or alignment, and adjusting the matrices endwise individually in order to bring their selected characters, one on each matrix, into a common line."

And the issues framed on the second of the applications of Mergenthaler, with the subsequent application of Scudder, are in three counts, and are as follows :

"1. The combination in a line-casting machine having suitable operating mechanism, of a series of matrices, each having several different characters less in number than the assortment used in the machine, the characters being independently usable, and a distributing mechanism by which the matrices are returned to their place of storage through a path different from that pursued in the course of composition.

"2. In combination with the matrices each having a series of characters at different points in its length, and a composing mechanism for assembling said matrices with their selected characters in line, a bed or support for the line having a rib or guide to engage the matrices and prevent them from shifting endwise in relation to each other after they are assembled, and means for shifting said composed line along said rib or guide to the required point.

"3. The combination with a series of matrix bars each having type on its edge, of a magazine having a chamber for and adapted to contain a plurality of each species of the series, means for separately delivering either species of matrix bar, a series of stops corresponding with the character on the matrices, and finger-keys, and connected mechanism whereby any desired stop can be projected into the path of any one of the released matrix bars."

On neither issue did Mergenthaler introduce any testimony to prove priority of invention, but rested on the dates of filing his applications, namely, December 23, 1890, and

May 5, 1891. But Scudder introduced evidence to support the claim made in his preliminary application, and, upon the evidence introduced by him, he contends that he has successfully shown conception and disclosure to others of the subject matters of the several issues of interference as far back as February, 1889, and that he made drawings of his alleged invention, in February and November, 1889; and thus he claims to have established priority of invention.

In No. 16,233, the first case of interference, the examiner of interferences decided both issues in favor of Scudder; and in No. 16,270, the second case, he decided the first issue in favor of Mergenthaler, and the second and third issues in favor of Scudder; and he accordingly awarded judgment of priority of invention in favor of Mergenthaler on the first count in No. 16,270, and in favor of Scudder on all the other issues in both cases of interference.

On appeal to the board of examiners-in-chief, that tribunal decided all the issues of interference, in both cases, in favor of Mergenthaler, thereby reversing the judgment of the examiner of interferences, so far as the latter had decided in favor of Scudder, and held that Mergenthaler was entitled to priority of invention upon all the issues of interference in both cases. That ruling was appealed from, and the cases were taken before the Commissioner of Patents in person, and the latter reversed *in toto* the decision of the examiners-in-chief, and awarded priority in favor of Scudder upon all the issues; and it is from that decision that these appeals are taken to this court.

*Messrs. Betts, Hyde & Betts (Mr. Frederick H. Betts, Mr. J. E. H. Hyde and Mr. Wm. B. Whitney, of counsel,)* for the appellant.

*Mr. Marcellus Bailey* for the appellee.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

The appellant has assigned several grounds or reasons for

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the appeals, but they all may be reduced to two principal questions: 1st. Whether, prior to the applications filed by Mergenthaler, there was complete conception of the inventions in issue by Scudder, and sufficiently shown in proof; and, if so, 2d. Whether Scudder has proven that he proceeded with reasonable diligence to reduce the conception to practical form?

1. The appellant, Ottmar Mergenthaler, is the senior party in both interferences; and his application involved in No. 16,233 was filed nearly two years, and his application involved in No. 16,270 was filed nearly a year and a half before the single application of Scudder was filed. The cases being thus presented, the *onus* is upon Scudder to establish by clear proof the fact of priority of invention. This is an established principle both by rule and decision.

By Rule 116 of the Patent Office it is provided that, "In original proceedings in cases of interference, the several parties will be presumed to have made the invention in the chronological order in which *they claim the same in their completed applications* for patents *clearly illustrating and describing the invention*; and the burden of proof will rest upon the party *who shall seek to establish a different state of facts.*" But by Rule 117 it is declared that "The preliminary statement can in no case be used as evidence in behalf of the party making it."

The allowed applications of Mergenthaler operated as constructive reduction to practice of the inventions claimed, and it was therefore incumbent upon Scudder to show by clear proof completed invention prior to the dates of such applications of Mergenthaler. *Porter v. Loudon*, 7 App. D. C. 64, 72; *Soley v. Hebbard*, 5 App. D. C. 99, 103; *Christie v. Seybold*, 64 O. G. 1650, 1653.

Before examining the facts relating to the question of priority of invention, it may be well and of interest to refer to the state of the art of invention and construction of linotype and linecasting machines, in order to see to what extent the

previously existing invention, pertaining to the subjects involved in the present issues, may throw light upon and aid the claim and contention of either of the parties to the present cases of interference.

In a recent number of Chambers' Journal, published in Edinburgh, occurs an article giving quite a graphic description of the linotype printing machine, and which article was republished in this country, in the Eclectic Magazine of Foreign Literature, Science and Art, for July, 1897. That article is descriptive of the state of the invention prior to the dates involved in the present issues. In that article is given the history of the progress of the inventions relating to the art of printing by machine presses. The writer gives a short history of the evolution of the art, and says that it has progressed to such an extent that we now have "an almost human machine that simply needs to be kept fed with molten metal while turning out automatically the most perfect type ready for the printer's hand." After describing previous inventions and processes, the writer says:

"The invention of the linotype company machine marks a revolution greater than anything which has occurred in printing during the past four hundred years. It is neither the first nor the only attempt that has been made at what is called 'mechanical composition,' as distinguished from ordinary type-setting by hand. But it is the first successful attempt, we believe, to combine type founding with type-setting, and in point of fact to dispense with fonts of type altogether. And it is a proved success, both mechanically and economically. Even the trade unionists have recognized that the thing has 'come to stay,' and, adapting themselves to the situation, skilled compositors are as quickly as possible transforming themselves into skilful machine operators.

"The linotype can not be said to be the invention of any single individual. In its modern form it is a completion of the design of Ottmar Mergenthaler, but the machine in

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use to-day represents the product of no fewer than fourteen hundred separate patents. That is to say, it is the embodiment of successive improvements, found to be necessary after Mergenthaler's machine came into practical operation. But the idea itself is an old one—as old, one may say, as the stereotyped blocks with which the ancients stamped their pottery. It is a curious thought that on the eve of the twentieth century we are going back to the first, or even earlier, in principle. But without going so far back, we may find the germ of the linotype in the logotype which early in the present century found so much favor.

“The difference between the linotype and all previous typesetting machines is material, for the linotype does not set type at all. It does not compose types, but composes matrices in lines. In ordinary type the characters are in relief on the metal; in a matrix the characters are impressed in *intaglio*. This was the original thing about Mergenthaler's invention—the dispensing with a magazine, or font, of movable metal types. He had many imitators, but the Court of Appeals in the United States found that he was really the first to ‘combine with mechanism for forming a matrix composed of a series of dies adapted for transposition or rearrangement, a mold and a casting mechanism, and the first to produce a practical machine by which ordinary hand composition is superseded.’

“The linotype does not cast letters, it casts lines; hence its name, line-of-type. It has taken twenty years and fourteen hundred patents to bring the machine up to its present state, which may not yet be perfection, but yet it is so efficient that it is being adopted in all the principal newspaper offices in the country, and gradually in the great printing houses. It was unfortunate, perhaps, in being placed on the market too soon, for the first machines were not a success, and caused rather a prejudice against the name—a prejudice which has had to be overcome.

"The mechanical compositor has no heavy cases of type to pick and choose from. He sits in front of a machine so compact that it does not occupy more than six square feet of floor space. Before him is a key board, not unlike that of a typewriter. When he depresses a key he instantaneously releases a matrix in the magazine above him, bearing a character corresponding to the key. This magazine is placed sloping downward toward the operator, and the matrices as released drop by natural gravity through vertical channels on to a traveling belt, which carries them as quick as thought, one after the other, into a little compartment on the operator's left, where they compose the words under his eye. The side of this little chamber is open, and on the portion of the matrices exposed to view the characters they represent are marked. In this way the operator can at once detect any literal error as it occurs, extract the wrong matrix and insert the correct one in an instant without stopping the machine. When the little chamber or block, which is adjusted to the width of the column to be printed, is about full it announces the fact by ringing a bell, thus giving the operator time to see how much more he can get in. Then by the touch of a lever the operator sends the line on a stage to the moulding wheel, connected with which is a pot of molten metal, kept hot by gas burners. Half a turn of this wheel forces out a charge of molten metal and presses it into the incised letters on the matrices. The line is thus cast in an instant in a single solid bar. An arm now comes down with a swoop from the top of the machine, seizes the matrices and places them on a distributing bar, perhaps the most wonderful part of the machine, and almost human in its intelligence. Each matrix is a thin piece of brass, and on the opposite end to the letter is toothed something like a Chubb's lock, and by means of these teeth it hangs on to corresponding teeth on the bar, along which the matrices are forced by a worm wheel. At intervals there are vacancies on the bar, and a matrix on reaching one of these vacancies loses its grip there

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and drops into its own proper groove, and runs into the magazine ready for use again. No matrix can drop off the bar until it reaches its own box, nor can it be carried beyond, for the slightest disturbance of the adjusted teeth causes the machine to stop.

"Now to come back to the cast 'line-of-type.' The mould-wheel, in returning to position after having ejected the metal, forces the line or bar out into a receiving galley, where a little automatic arm holds all the lines in position until the 'take' is full—say one hundred lines or so. Then the operator lifts it out, sends it away for proof, and starts at once on his next 'take.' The movement is continuous. While he is setting one line of type by his keyboard, another is being cast, and the matrices are being redistributed as fast as he can use them. At the side of his keyboard is a little lever by which he introduces space-bands to divide the words. These bands are of tapering thickness, so that the spaces can be made as close or as wide as desired, and all is done as smoothly and effectively as if by the human hand. This automatic justifying is a thing that used to be accounted an impossibility, but it is done, and all because matrices are used instead of metal types.

"But it is practically impossible," says the writer of the article, "by mere verbal description to give an accurate representation of this marvellous machine, which comprises two thousand separate pieces of mechanism. It is a combination of the ideas of many minds adjusted to this particular purpose. Seated at his keyboard the modern printer is both machinist, typesetter, justifier, type-founder and type-distributor. Motive power is supplied to him by shafting from some central steam or gas engine, and all he has to do is to manipulate his keyboard and keep his melting pot supplied with metal, while, of course, using his eyes to see that the right matrices are coming into position. The old typesetting machines required three operators, one

for the keyboard, one to keep up the supply of type, and one to 'justify' the lines."

We have thus extensively extracted from, or rather reproduced, the descriptive portions of the article referred to, because of the lucid and instructive description furnished of the highly organized and very complex machine called the "Linotype," and because of the great difficulty we would have of conveying an adequate description of the combination and construction of the machine and of its manner of operation, to those who had never seen it in action. It may be that the statements in regard to the number of patents embodied in the combination, and the number of pieces of separate mechanism contained in the machine, are excessive, though we have no *data* at hand to show any such error, if there be such. Patents to Mergenthaler were granted in 1885 and 1886, and the proof in this case shows that the changes, modifications and improvements in the machine have been constantly going on since the date of the original patents.

By the proof of this case it is shown, that Mergenthaler is the original inventor of line-casting machines, as we now have them, and that he has invented and developed two general types or kinds of these machines, having distinguishing mechanism and methods of operation, the one from the other. The first of these, known as the "band machine," employs matrix bars, connected to and forming an integral part of the machine, each bar bearing on its face or edge the whole assortment of letters or characters used in the machine. In this machine the matrices are assembled in line by a keyboard mechanism, which, on bringing each matrix into line, at the same time stops it at the proper height for the letter or character required. Upon this being done, the line is justified and the casting operation performed, and then the matrices are returned to their original position ready for use in the operation of casting the next line of type.

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The other machine, known as the separate or single character matrix machine, and which is in most general use, has, as a distinguishing feature, a separate matrix for each separate letter or character in the assortment used in the machine. The matrices are stored in a magazine, each letter in its own compartment, and the several matrices necessary to form a composed line are discharged from their respective magazine compartments and assembled in line by means of mechanism operated by a keyboard. After being thus assembled the line of matrices is moved to the casting point and is there justified and the casting operation performed, after which the matrices are automatically distributed and returned, each to its respective compartment in the magazine. These machines have been used with great success.

Since the construction and use of these two different types of machines, Mergenthaler has attempted to develop an intermediate type of machine, that containing the combinations described in the issues of this interference.

Such was the state of the art or the invention of the linotype or line-casting printing machines at the time when, and in view of which, the parties to this controversy claimed to have completely conceived and disclosed, and illustrated by drawings, the invention as embodied in the machine containing the combinations described in the issues of interference. That Scudder, the junior party, was entirely familiar with the pre-existing machines invented by Mergenthaler, would seem to be clear; for the proof shows that he was, from the year 1888 to some time in the latter part of the year 1891, in the employ of the Mergenthaler Company at Brooklyn, and was, during a larger part of that time, superintendent of the Mergenthaler factory at a liberal salary. As superintendent of the factory, Scudder was doubtless familiar with the older form or band machine, and it appears that he was well acquainted with all the details of construction and operation of the single-character matrix

machine, which was being introduced into the newspaper and book printing houses of the country. To what extent he made his knowledge thus acquired available in the conception of his alleged invention, which led to his drawings of May, 1890, and his subsequent construction of his line-casting machine, involved in the issues of these cases, is more a matter of rational supposition than of positive proof. Doubtless he had in mind the previous state of invention, and his effort was so to differentiate his conception as to make a machine that would be independent in structure and operation from those of Mergenthaler's invention. And the question is, did he accomplish this object at a time and in such complete practical form, as to entitle him to priority in the present issues of interference?

A complete conception, as defined in an issue of priority of invention, is matter of fact, and must be clearly established by proof. The conception of the invention consists in the complete performance of the mental part of the inventive act. All that remains to be accomplished, in order to perfect the act or instrument, belongs to the department of construction, not invention. It is therefore the formation, in the mind of the inventor, *of a definite and permanent idea of the complete and operative invention, as it is thereafter to be applied in practice*, that constitutes an available conception, within the meaning of the patent law. 1 Robinson on Patents, Sec. 375.

"He who first conceives *and gives expression to the idea of an invention in such clear and intelligible manner that a person skilled in the business could construct the thing*, is entitled to a patent, provided he uses reasonable diligence in perfecting it." *Machine Co. v. Harvester Works*, 42 Fed. Rep. 152, 157. Or, as said by Mr. Commissioner Leggett, in *Chapman v. Candee*, 2 O. G. 245, "It is for him (the party upon whom the *onus* rests) to prove priority of invention, and he may do it by establishing either that he was the first to conceive the

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idea and the mode of putting it into practice, and used reasonable diligence in adopting and perfecting it, or that he actually perfected and reduced the invention to practice prior to the date of the application of the opposing party to the issue." Or, as more fully stated by the same learned Commissioner, in the case of *Cameron & Everett v. I. R. Brick*, 6 C. D. 171, p. 89, "The point of time at which invention, in such sense as to merit the protection of law, dates is neither when the first thought of it is conceived, nor when the practical working machine is completed, but it is when the thought or conception is practically complete; when it has assumed such shape in the mind that it can be described and illustrated; when the inventor is ready to instruct the mechanic in relation to putting it in working form; when the 'embryo' has taken some definite form in the mind and seeks deliverance, and when this is evidenced by such description or illustration as to demonstrate its completeness. . . . The true date of invention is at the point where the work of the inventor ceases and the work of the mechanic begins. Up to that point he was inventing, but had not invented, and he must have invented before the law will come to his protection."

In the case of *Voelker v. Gray*, 30 O. G. 1091, Mr. Commissioner Butterworth, in defining what will constitute complete conception, within the meaning of the patent law, says that the party claiming "must have been first to conceive the thing in controversy; not merely to conceive it possible to construct a device which would produce the result sought. . . . The conception must not be the result to be obtained, but the means (which is the patentable thing) to produce that result. As long as there is a missing ingredient, in the absence of which the means utilized is a failure, the desired result unattainable, the invention is incomplete. . . . That of which the law takes notice is not the maturing but the matured conception which can materialize in an operative device; but it very frequently

occurs that the inventor confounds his original device and later conception and gives the latter the date of the former, and does it innocently."

It follows from the principles thus enunciated that the date of the conception is the date when the idea of means, including all the essential attributes of the invention, becomes so clearly defined in the mind of the inventor as to be capable of exterior expression. 1 Robinson on Patents, Sec. 380. And it is settled, both by practice and express decision, that such exterior expression of the mind of the inventor, when relating to machinery, may be by exhibits either in the form of drawings or by model, so as to lay the foundation of a claim to priority, if thereby the invention be made sufficiently plain to enable those skilled in the art to understand it. *Webster Loom Co. v. Higgins*, 105 U. S. 580, 594.

Now, upon the application of these well-settled general principles, the *onus* of proof being upon Scudder, the question is, whether, upon the facts of the case, the *prima facie* effect of the applications filed by Mergenthaler has been overcome, and the priority of invention, as matter of fact, has been shown by Scudder, in plain, definite and comprehensive terms?

The fact of conception by an inventor, for the purpose of establishing priority, can not be proved by his mere allegation, nor by his unsupported testimony, where there has been no disclosure to others or embodiment of the invention in some clearly perceptible form, such as drawings or model, with sufficient proof of identity in point of time. For otherwise such facile means of establishing priority of invention would, in many cases, offer great temptation to perjury, and would have the effect of virtually precluding the adverse party from the possibility of rebutting such evidence. Hence it has been ruled in many cases that the mere unsupported evidence of the alleged inventor, on an issue of priority, as to the fact of conception and the time thereof, can not be received as sufficient proof of the fact of prior conception.

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*Hisey v. Peters*, 6 App. D. C. 73; *Stevens v. Putnam*, 18 O. G. 520; *Farmer v. Brush*, 17 O. G. 150; *Brungger v. Smith*, 62 O. G. 1511. But any full and accurate description of the invention, either in words or drawings or by model, if it be of a machine, or even an unsuccessful effort to embody the conception when the effort discloses that the idea was complete, will suffice, although the attempt to represent it may have failed. In the absence of all other proof, the date of the application for a patent, if containing a complete description, is taken as the date of the conception. 1 Robinson on Patents, Sec. 380. But if drawings be exhibited and relied on, as evidence of the conception of the invention, they must show a complete conception, free from ambiguity or doubt, and such as would enable the inventor or others skilled in the art to reduce the conception to practice without any further exercise of inventive skill. *Id.*

In his preliminary statement Scudder alleges that he conceived the invention claimed by him, and made disclosure thereof, in February, 1889; that he made experimental matrices in November, 1889, and also began an experimental machine, embodying the subject-matter of some of the counts of interference in December, 1891; and that he finished such machine in February or March, 1892; and that he subsequently built a second and a third machine. He also alleges that he made drawings in May, 1890, which he has produced as evidence of a *completed conception of the invention at that time*. But there is no evidence legally sufficient, apart from the testimony of Scudder himself, to show clearly and definitely the fact of conception of the invention involved in the present issues of interference, prior to May, 1890, the time when the drawings exhibited as evidence of conception were made. The case of Scudder must, therefore, depend largely, if not entirely, upon the sufficiency of those drawings as evidence of completeness of conception. For, as all the work of embodying the invention in a working machine was done after Mer-

genthaler *had filed his applications*, Scudder can not avail himself of such subsequent work to establish prior conception to Mergenthaler's applications. If, however, those drawings are shown to be sufficient to establish a complete conception of the invention in issue in May, 1890, that date being prior to the filing of Mergenthaler's applications, and Scudder can show that he has used reasonable diligence in reducing such conception to practical form, then he is entitled to the position of prior inventor, and, consequently, to a patent for such invention.

Now, as we have shown that there is no sufficient evidence of conception of the invention in issue prior to May, 1890, do the drawings of that date, relied on by Scudder to prove conception of the invention in issue, so clearly and distinctly show to any one skilled in the particular art the mechanism adapted to perform the functions which are claimed to be novel and useful, as to enable such person to understand and practically use such invention? There is a third sheet of drawings alleged to have been made by a draughtsman employed by Scudder, for the purpose of showing and illustrating the completion of the conception; but as these drawings were not made until December, 1891, after the filing of the applications of Mergenthaler, they are not evidence *per se* of priority of conception, and, while the testimony of Scudder may be material to explain what is shown in the drawings, his testimony alone, as we have seen, is not competent or admissible to establish the fact of priority of conception.

In order to identify them and to show what the drawings of 1890 expressed and illustrated, and that they were sufficient to enable a skillful mechanic to understand and use them, Scudder produced as a witness a person named Sytz, a mechanic familiar with the construction of linotype machinery, and who had been, for a considerable time, employed with Scudder in the Mergenthaler workshops at Brooklyn, and occupied therein a prominent position. This

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witness identified the drawings of 1890, and thinks they were made by Scudder in June or July, 1890; and that they represented and illustrated a key-board and magazine, and a means of assembling the matrices into line. He also says that one of the drawings showed a distributing mechanism. He testifies that Scudder entered upon the work of building a line-casting machine, embodying the plan which he had devised and showed in the drawings referred to, in December, 1891; that he saw said machine about May or June, 1892, and it was not then completed. He saw a completed machine embodying the plan in November, 1892. But, in answer to cross-question 122, the witness says that he does not think the machine was running; it was only partly completed; in fact, says the witness, "if I remember right, the base stood on a couple of wooden saw-horses." In answer to further question the witness replied that: "While it was only a partly completed machine, it had the keyboard and magazine on and a means for assembling the line, also means for transferring the line. The distributor, while they said that they had it working, was not on the machine when I saw it; it was on the bench for repairs or changes, and I do not remember whether there was any means for casting a line. I do not think the matrices had any characters upon them at that time." He further testified in regard to the drawings of 1890, that they did not show many of the essential things to completeness of the machine in issue. By cross-question 82 the witness was asked, "Did the 1890 drawings, when you last saw them in 1890, represent any means for guiding the matrices falling from the magazine at different points to one and the same point at the end of the line, or any means for transferring the line to the casting point, or any casting mechanism, or any spacing or justifying mechanism of any kind, or any means for transferring the line to the distributor, or any means for releasing the assembled matrices and lining them up with their ends in their required rela-

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tion to enter the distributor, or any means for advancing them through or along the distributor to the magazine, or any driving connections?" The answer was, "No, sir; the drawings did not show such things."

The witness also testifies that there were essential parts and connections in the Scudder machine not shown in the drawings of 1890, and were not embodied in the Mergenthaler machines. By cross-question 114, the same witness was asked: "Am I to understand from your testimony-in-chief that in the Mergenthaler machines built in the Brooklyn factory there were line-assembling devices, carriages for conveying the composed line and elevating devices to the distributor, or devices for feeding the matrices through the distributor which were constructed and arranged in forms suitable for use with the devices shown in the May, 1890, drawings?" The answer was: "No, sir."

This same witness, a skilled mechanic in the art, further testifies that, although he was familiar with these drawings of 1890, he could not understand them, or Scudder's explanation of them, without sketches of the different parts of the contemplated machine.

Cross-question 58. "During 1890, and prior to August of that year, did you see any other drawings of Mr. Scudder's similar to the drawings in evidence to which you have referred?" Answer. "No drawings; simply sketches which he made so that I could understand the parts he was explaining."

Cross-question 59. "You refer, I suppose, to sketches other than these 1890 May drawings?" Answer. "Yes; freehand sketches which he would make on the margin of a newspaper or an envelope or something of that sort."

Cross-question 60. "Why were these sketches necessary if you were already familiar with the May, 1890, drawings?" Answer: "More to explain in detail those parts which I could not understand from his conversations."

Indeed, this witness frankly admits, though a skilled

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mechanic, with special knowledge in the construction of linotype machines, that he can not now understand the drawings of May, 1890, though Scudder had previously explained them to him, both orally and by means of freehand sketches. This is shown in the following cross-examination of the witness:

Cross-question 86. "Referring to your answer 33, am I right in understanding that the parts and movements therein named were things which Mr. Scudder proposed to develop, but which were not shown in any drawings which you saw in 1890?" Answer. "The key-board was shown, and' a means for releasing the matrices and bringing them down to an aligning bar, and the distributing wires are shown, *but the rest of it was only shown in such sketches as he made for me so that I could understand his plans, and were afterwards destroyed.*"

Cross-question 110. "Am I correct, then, in understanding that you do not recollect the details of the matrix-feeding mechanism, or how it was that the matrices were to get into the magazine-channels leading to the point of delivery, or how the pawls acted in delivering them?" Answer. "You are."

Cross-question 111. "Are you not, as a skilled mechanic, accustomed to working from drawings, able to determine the construction and operation proposed in reference to the May, 1890, drawings, and in the light of the fact that you saw them made and repeatedly discussed them with Mr. Scudder?" Answer. "I consider that I am capable of understanding drawings, and I think that I understood these drawings at the time they were made, but there were a great many little details which are not on the drawings, and if they were explained to me I have forgotten them."

Cross-question 112. "I suppose you refer to details which it would be necessary for you to have in mind or before you in order to understand the construction and operation of the parts shown in the May, 1890, drawings?" Answer. "I do."

Similar answers were made to other interrogatories.

But Scudder himself was a witness in his own behalf, and testified as to his relations with and as employee of the Mergenthaler Factory Company, during the time that he was engaged in conceiving and experimenting with his invention, from 1889 to 1892; and he testified as to the time and circumstances of his making the drawings of May, 1890. He described his invention as developed in his line-casting machine of 1892, which did *not* in fact embody all the parts and connections and conform to the drawings of 1890. He says, "in December, 1891, I engaged a draughtsman, whose name was Baker, to make drawings more fully illustrative" than the drawings of 1890. He was then asked for what particular purpose were the drawings of which the one he then produced was made in 1891. His answer was, "For the purpose of building a working model from it." The next question was, "Was that model built?" The reply was, "It was." He then stated where and when built. And in answer to these latter questions, he said the work on the machine "was actually begun in December, 1891, and a working model, as far as the keyboard, magazine, and assembling devices and distributor were concerned, was completed in March, 1892." In answer to another question, "Did that model or experimental machine, as completed in March, 1892, embody the mechanism illustrated in your May, 1890, and your December, 1891, drawings?" he said: "It did, largely, but not wholly. The making of some of the parts were changed in order to manufacture more easily, and others in detail to get better and more accurate results; but no departure was made from the original drawings, except in detail." He was next asked whether anything had been done preparatory to the commencement of the work on the experimental machine—begun in December, 1891—whether any preparatory work had been done before that time? He answered, "Yes, there was. From time to time I had made different lots of experimental matrices, and had talked over

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with those in whom I had confidence, different details and plans for operating a machine of this class, and had, as far as I could practically do so, worked out the details of this machine. Owing to the nature of the business I was employed in at that time, and the fact that it was being pushed almost night and day, left me with but slight opportunity to engage myself wholly upon a work of this kind, as, *owing to the entire change from the existing machines of this class, an entire departure from the fixed plans of doing this work had to be made. In fact, every movement in the machine had to be designed especially for it, and no one of the then known means of assembling and distributing matrices or matrix bars was applicable to my invention.* A new system of storing the bars, releasing, adjusting them endwise, and assembling them beside each other, handling the composed lines, preparing them for distribution and distributing them, had to be made, as the fact that the matrix bar was independent and had several characters upon it, required entire new mechanism to handle it. This work, while it was considerable, was constantly going on at such times as I could spare from the business I was then engaged in." And upon a very lengthy and searching cross-examination of Scudder, it is very fully shown that the drawings of May, 1890, in many important particulars, are wholly insufficient and inapplicable in point of completeness, as means of showing and illustrating all the parts and connections of the invention involved in the present issues of interference. This cross-examination, though of great importance as evidence, is of too great length to be inserted in this opinion; but such parts of it as relate to the drawings of 1890 and their want of sufficiency to illustrate the issues of interference (those parts which have been printed in the brief of appellant), will be appended hereto as a foot-note by the Reporter.\*

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\*X-Q. 109. When did you first have drawings showing the machine complete with all the parts necessary for casting line bars from matrices each bearing a number of characters? I mean drawings from

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It is manifest from all the evidence, and especially that of Scudder himself, that the drawings of 1890 are in many essential particulars defective and wanting in completeness as means of showing and illustrating the invention involved in the present controversy; and such defect and want of completeness in the drawings can not be aided, and the defective drawings made available by construction, or by reference to

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which a machine could be constructed without the addition of working parts other than those shown in the drawing.

(Objected to by counsel for Scudder as involving parts of a line-casting machine over and beyond the mechanisms involved in these interferences.)

A. Some time during July, 1892.

X-Q. 110. When did you first complete drawings showing a line-casting machine having therein suitable operating mechanisms and a series of matrices, each having several different characters, less in number than the assortment in the machine, and a distributing mechanism by which the matrices are returned to the magazine through a path different from that pursued in the course of composition?—A. If that question relates to the assembling and distribution of matrix bars for the purposes of casting a line, such drawings and plans were made in May, 1890, and if you mean a detail or working plan suitable for use in the hands of mechanics, such plans were subsequently made in December, 1891, also in January, 1892.

X-Q. 111. Do the drawings of May, 1890, to which you refer, contain any means for presenting the matrices to the distributor?—A. They did not; no, sir.

X-Q. 112. Did the drawings of May, 1890, contain any means for advancing the matrices through or along the distributor to the magazine or place of storage?—A. They did not; no, sir.

X-Q. 113. Both of these devices are necessary to a practical or commercially operative machine, are they not?—A. They are; yes, sir.

X-Q. 114. Do the drawings of May, 1890, show any assembling box or device by which the matrices successively delivered are inserted one after another at the end of the line?—A. They do not; no, sir.

X-Q. 115. Do the drawings of May, 1890, show any means for advancing the line endwise as composition progresses in order to leave room for the incoming matrices as they fall one after another?—A. They do not.

X-Q. 116. Do the drawings of May, 1890, show any means for preventing a matrix discharged from the magazine from falling on top of the matrices already delivered into the line?—A. They do not.

X-Q. 117. When you came to construct a working machine you

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the prior state of the art, or of the then existing linotype or line-casting machines, as seems to have been supposed by the Commissioner of Patents, upon the principle stated in the case of *Webster Loom Co. v. Higgins*, 105 U. S. 580. Scudder

found it necessary to provide means for the purposes named in the last three questions, did you not?—A. I did; yes, sir.

X-Q. 118. Do the drawings of May, 1890, show any means for preventing the rebound or vertical reaction of a matrix when dropped into the line?—A. They do not; no, sir.

X-Q. 119. When you built a working machine it was found that a device for this purpose was necessary, did you not?—A. In order to insure speed and accuracy; yes, sir.

X-Q. 120. Do the drawings of May, 1890, show any means whatever for clamping or confining the line of matrices in course of composition?—A. No, sir; they do not.

X-Q. 121. Do the drawings of May, 1890, show any means for operating the aligning bar which maintains the longitudinal adjustment of the matrices?—A. The aligning bar was a fixed bar or rib corresponding in size to the aligning notches of the matrices. Such bar is shown.

X-Q. 122. Do the drawings of May, 1890, show any means whatever for casting type bars against a composed line of matrices, or for presenting the composed line of matrices in position to co-operate with a casting mechanism?—A. It did not; no, sir.

X-Q. 123. Do the drawings of May, 1890, represent any provisions of space or means for introducing spacers into the line in course of composition or for adjusting spaces in the line to effect justification?—A. They do not; no, sir.

X-Q. 124. In the drawings of May, 1890, what provision, if any, is shown for confining or transferring the composed line of matrices in the manner which would be necessary to admit of a type bar being cast against it?—A. There are none shown.

X-Q. 125. Assume the parts to be constructed in strict accordance with the May, 1890, drawings so far as they go, would they, in your opinion, be practically operative?—A. As far as they go, I believe they would.

X-Q. 126. Did you ever construct any model or machine with the matrix-discharging mechanism in strict accordance with the May, 1890, drawings?—A. I did nearly, but did not complete the same far enough to test it, as I struck what I thought was a better scheme.

X-Q. 127. Do the drawings of May, 1890, show the shape of the matrices which you purposed to use with the parts therein shown?—A. They do not.

X-Q. 128. Referring to the May, 1890, drawing, am I correct in understanding that the magazine pawl *q* has one set of teeth on the

has undertaken to invent and construct a machine essentially different from the pre-existing linotype machine of Mergenthaler; not simply a mere improvement upon the previous invention. It is necessary for him, therefore, to furnish such full, clear and definite drawings of his invention as will enable any person skilled in the art of construction of such

lower arm to engage the lower ends of the matrices in one channel and also teeth on the under side of the upper arm to engage the upper ends of the same matrix?—A. You are correct.

X-Q. 129. Where is the shape of the matrices which you proposed to use shown in connection with your evidence, if at all?—A. I think the December, 1891, drawing was the first drawing of this matrix, although I must have at different periods made different sketches and drawings of the same matrix for the purpose of making those matrices which I have termed experimental matrices, and which were made with a view of determining the final shape to be made.

X-Q. 130. Am I correct in understanding that in the structure shown in the May, 1890, drawings there was to be in each magazine channel leading to the front of the machine a row of vertical matrices engaged at their upper and lower end by the respective teeth to the pawl *q* and separated slightly by these teeth from each other?—A. You are right; yes, sir.

X-Q. 131. What, if anything, is shown in the May, 1890, drawings to prevent the matrices from moving back with the pawl frame *q* when it retreats?—A. There is nothing shown in the May, 1890, drawings at all to prevent that; it was my intention to place in the partitions of the magazine fingers which were spring-pressed, which would engage the matrices and retain them when once thrown forward. This device I did subsequently make.

X-Q. 133. But neither of the feed devices to which you refer as subsequently made were like that in the May, 1890, drawing?—A. I substantially constructed the magazine with pawls similar to those shown in the May, 1890, drawings, the only difference being that the little tits or projections on the pawls were inclined to allow them to ride under and over the matrix bars. This magazine with the pawls did work and worked fairly satisfactory, but I later substituted for it a better device.

X-Q. 136. In a machine of the class here in interference, it is necessary, is it not, after the cast has been made from the line of assembled and longitudinally adjusted matrices, to release the matrices and permit them to move endwise in relation to each other

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machines to reduce his invention to practical form. But this he failed to do. To say nothing of the defects and inadequacies of the drawings, admitted to exist by Scudder himself, and his witness, Sytz, two expert witnesses, both skilled in the art of construction and in the use of drawings, testify that the drawings of May, 1890, are so defective as not to be understood by mechanics. Mr. Craue, one of these expert witnesses, sums up the condition of these drawings thus: "To recapitulate, the May, 1890, drawings afford no

until they line up; or, in other words, bring their distributing ends or hooks into proper relations to engage the distributing devices?—A. Such action is necessary.

X-Q. 137. Do the May, 1890, drawings show means for thus releasing or lining up the matrices preparatory to distribution?—A. They do not.

X-Q. 138. You have referred, in connection with the May, 1890, drawings, to bale rods on opposite sides of the key-bars *e* and to the necessity of means for the reversing the motion from the bales on one side as communicated to the matrix stops. Are these connections shown in the drawings?—A. They are not. But they are such that any skilled mechanic would have no trouble in applying.

(The last clause objected to as irresponsible and voluntary.)

X-Q. 139. Are any means shown in the May, 1890, drawings for moving the detents *k* and the pawl frame *q* in the reversed directions from those in which they are moved by the cams?—A. They were to be provided with springs as stated in my description, although the drawing does not show them.

X-Q. 140. Do the May, 1890, drawings show any means for restoring the key-bars *e* to their stepped position on the roller after being elevated?—A. The position of the spring which is attached to the key-bar *e* was to be located at such place that when elevated it also had tension forward which threw it onto the roller. The drawings of May, 1890, do not define this position clearly.

X-Q. 141. In the drawings of May, 1890, what is supposed to be represented by the sinuous line leading upward from the letter *f* to the key-bar *e*?—A. It is supposed to be a spring.

X-Q. 142. To what is it attached at the upper end?—A. The key-bar *e*.

X-Q. 143. In the drawings of May, 1890, is Fig. 2 a view of the magazine from the front or the rear?—A. It is supposed to be from the front.

X-Q. 144. In this drawing, if I understand it, the rods or guides 11 lead to the different compartments of the magazine; for example,

indication that they represent a line-casting machine, and if they do claim to represent such a mechanism they are destitute of the greater part of the essential elements of such a machine, and the parts which they do exhibit are incomplete, inoperative and unsuited to perform the functions which belong to such parts."

And Mr. Brevoort, the other expert witness, after pointing out in what respects the drawings of May, 1890, failed to show a conception of the various combinations of the issues in controversy, says: "It will thus be seen that the drawings, sheets 1 and 2, do not show to a person looking at them any of the combinations which are set forth in the four interference issues which I have been considering. No one looking at the drawings would obtain therefrom the information contained in the combination, nor would he find or have

the bottom guide to the first compartment on the left, the guide next above to the next compartment to the right for longer matrices, and so on through the series.—A. You are right; yes, sir.

X-Q. 145. Referring still to these May, 1890, drawings, I observe that they are not dated, and apparently not witnessed. Can you say with certainty when they were completed in their present shape?—A. They were completed fairly close to that period.

X-Q. 146. To what persons, if any, were these May, 1890, drawings exhibited and explained in detail at or about the time they were made?—A. To E. A. Sytz, Brooklyn.

X-Q. 147. To any other person?—A. Not at that time.

X-Q. 148. When and to whom were the May, 1890, drawings next exhibited and explained after that exhibition to Sytz?—A. I think they were next shown to Mr. L. G. Hine, of Washington, about November, 1891.

X-Q. 149. Is the Sytz referred to the one who was then and is now a foreman in the Mergenthaler shop in Brooklyn?—A. He is; yes sir.

X-Q. 157. You understood, did you, that my reference to the May, 1890, drawings during my entire examination to-day was to the two sheets which you have offered as exhibits?—A. I did; yes, sir.

X-Q. 158. When did you first have drawings of a line-casting machine as a whole in which the combinations forming the subjects matter of the two interferences, 16,233 and 16,279, were incorporated?

(Counsel for Scudder asked whether by this question is intended a

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exhibited to him the combinations and the elements of the combinations which are set forth in the various issues."

It must be borne in mind that we are not considering as evidence, to affect the question of priority of invention, Scudder's completed machine of 1892; but we are considering the sufficiency of the drawings of May, 1890, as evidence of the completed conception of Scudder of the subject-matters of the issues of the interference *at the time that the applications* of Mergenthaler were made. And, as we have seen, these drawings are, in many essential respects, defective and insufficient as proof to establish the claim of priority of invention.

Upon the whole case, and each of the cases, we entirely concur with the conclusion reached by the examiners-in-

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machine as a whole, including casting and line-ejecting mechanism and their appurtenances.)

(Counsel for Mergenthaler replies that he includes within the question whatever is necessary to make up the "line-casting machine" specified in the issues in interference.)

A. I think the latter part of July, 1892.

X-Q. 159. Then, if I understand you correctly, it was in July, 1892, that you first had drawings showing a line-casting machine having a series of matrices, each having several different characters, less in number than the assortment in the machine, a distributing mechanism by which the matrices were returned to the place of storage, and suitable operating mechanism. Is that correct?—A. You are correct.

X-Q. 161. When did you first complete drawings showing in combination a series of matrices each with a number of characters at different points in their length, a composing mechanism for assembling said matrices with their selected characters in line, a bed or support for the line with a rib to prevent the matrices from shifting endwise in relation to each other after assemblage, and means for shifting said composed line along said rib or guide to the required point?—A. Not until July, 1892.

X-Q. 162. Did you previous to this time, July, 1892, made any drawings showing the combination of mechanism recited in a previous question except as to the matrices?—A. I did not; no, sir.

X-Q. 163. I assume you understood my last two questions as covering drawings which were made either by you or for you?—A. Yes.

chief; and their conclusion being stated in clear and explicit terms, we shall adopt it in the terms employed by them. They say:

"From the drawings themselves, and from the evidence of Sytz, and from the evidence of Scudder, we think it impossible to say that Scudder had at the date of these drawings any definite conception of the actual arrangement of the parts necessary for storing the bars, releasing them, adjusting them endwise, assembling them, handling the composed lines, preparing them for distribution, and distributing them. And the essence of the invention involved in these issues lies in the arranging and inventing these parts to perform these necessary functions, although most of them were clearly suggested in one or the other of the old machines.

"These drawings, when taken in connection with the drawings of his application and the actual embodiment of the idea in a working machine, *show at most* that he at that time had the germ of the idea which at some subsequent time was matured into the form shown in the present embodiment (that is, the machine of 1892), but this inchoate and incomplete idea is not sufficient." That is to say, not sufficient to show complete conception prior to the dates of the filing of the applications of Mergenthaler.

The views we have expressed and the conclusion resulting therefrom apply alike to both cases of interference, No. 16,233 and No. 16,270. The two interferences have been conducted and considered as one case; the exhibits, testimony, and briefs, being the same in both cases; and both are subject to the same conclusion.

2. With respect to the question of due diligence by Scudder, the examiners-in-chief were of opinion that due diligence had not been exercised by Scudder since May, 1890, the time of making the drawings, in adapting and perfecting the invention alleged to have been conceived by him at that time. But, in the view we have of the principal question, we deem it unnecessary to express an opinion

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upon the question, whether due diligence was exercised by Scudder or not. That question is immaterial.

It follows that the decisions of the Commissioner in both cases of interference must be reversed; and the clerk of this court will certify this opinion and the proceedings in both causes of interference to the Commissioner of Patents, that they may be entered of record in the Patent Office, according to law; and it is so ordered.

*Rulings appealed from reversed, and causes remanded.*

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HIEN v. BUHOUP.

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PATENTS; INTERFERENCES; CHANGE OF FORM; PRIORITY; APPELLATE PRACTICE.

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1. The modification of the pin used in a device for coupling cars from a round shank to a square shank with an oblong head, and the substitution of this modification in form for that put in use in the original invention is not such a departure from the original invention as to disentitle the inventor to the right of priority, as against a party who had conceived subsequently to the original invention, but not put into practical operation, a device similar in principle, but of different form and operation.
2. The change from a round-shanked pin with button head to a square-shanked pin with oblong head, to remedy a defect in operation, is simply a matter of variation of construction, not affecting the substance of the invention claimed, and could well be made by mere mechanical skill without the exercise of the faculty of invention.
3. Where the decisions of all the tribunals of the Patent Office are in favor of the claim made by one of the parties to an interference, it must be made clearly and affirmatively to appear that such decision is erroneous to justify this court in reversing it.
4. *Held*, that it being clearly shown that the appellee was the first to conceive the device in issue, and the first to reduce to practice, and also the first to apply for a patent, he was entitled to be declared the prior inventor.

No. 66. Patent Appeals. Submitted May 10, 1897. Decided October 4, 1897.

HEARING on an appeal from a decision of the Commis-

sioner of Patents in an interference proceeding between rival applicants for a patent for improvements in car couplers. *Affirmed.*

*Messrs. Raymond & Omohundro* for the appellant.

*Mr. F. W. Ritter, Jr.*, for the appellee.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

This appeal is from a decision of the Commissioner of Patents, in a matter of interference between the application of the appellant, Phillip Hien, and that of the appellee, Harry C. Buhoup, for patents for certain alleged new and useful improvements in car couplers. The application of the appellant, Hien, was filed in the Patent Office April 23, 1895, being No. 546,872, and that of the appellee, Buhoup, was filed April 15, 1895, being No. 545,780.

The claim of the appellant was adjudged to interfere with the claim of the appellee, and the subject-matter of the interference was reduced to an issue and formulated thus:

"In a car coupler, the combination with a knuckle, its tail piece, and lock, of a movable pin or catch arranged back of the advanced position of the lock, and within the path of the tail piece of the knuckle; substantially as and for the purposes specified."

This issue of interference covers claim 5 of the application of the appellant, and is claim 5 of the application of the appellee. The question of priority thus raised in the Patent Office, as between the appellant and appellee, was adjudged by all the tribunals in that office to be with the appellee, Buhoup.

Hien has appealed to this court, and has assigned no less than twelve supposed errors in the rulings of the Patent Office; but the grounds so assigned for reversal may be reduced to three or four questions, and those mainly of fact, the principal question, that of priority of invention, being one of fact merely.

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A considerable volume of testimony was taken, but Hien was the only witness examined in support of his claim to priority. There is some conflict between the testimony of Hien and the witnesses examined on the part of Buhoup, the appellee. Without, however, placing much reliance upon this conflict of evidence, the officials of the Patent Office seem to have had little or no difficulty in arriving at the conclusion that Buhoup was entitled to the priority of invention of the claim in issue.

As was said by the examiners-in-chief, the issue involved in the interference is not limited to any specific form of the movable pin or catch, which is the important feature of the issue, so far as this interference is concerned. The parties to the interference show specifically different forms of the generic device,—Buhoup's device being a gravity pin, shown in the drawings as rectangular in cross-sections, though not restricted to such form in the specification, and Hien's device being a pivoted arm. There is no question but that the square-shanked gravity pin, with oblong head, of Buhoup is as much within the terms of the issue as the pivoted arm of Hien, and the round-shanked gravity pin, with button head, referred to in the evidence, is equally within the terms of the issue. In this construction of the specifications and issue, and the application of the evidence thereto, we entirely agree with the officials of the Patent Office. Indeed, we do not understand it to be seriously contended that the terms of the issue of interference are not sufficiently comprehensive to embrace the several forms of the device described in the specifications of the parties that is to say, the respective claims involve<sup>d</sup> in the issue. The issue, as described in the brief of the appellant, and the operative action of the device of the issue, is stated as being a gravity pin which rides upon the locking-block when the couplers are coupled, and drops in front of and holds back the locking-block when the couplers are uncoupled,—this pin being located within the path of the

tail-piece of the knuckle, and provided with a head on its lower end to receive the blow of the tail-piece. The action of the parts in uncoupling the cars sets the parts of the coupler in position for automatic recoupling.

There is no ground for question but that Buhoup was the first to conceive the invention of the round-shank gravity pin and button head, and he reduced that invention to practice in October, 1894, after he had seen the model of the conception of the device in issue by Hien, and the subsequent modification of the pin from a round shank to a square shank, with an oblong head, and the substitution of this modification of form for that previously put in use, was not such departure from the original invention as to disentitle the inventor to the right of priority, as against a party who had conceived subsequently to the original invention, but not put into practical operation, a device of similar principle, but of a different form and operation from that of the original conception.

It is alleged by Hien that the conception of the invention claimed by him was in November, 1893, and that he made disclosure thereof to others, and had a model made about the first of December, 1893. The model was made and exhibited in the early part of December, 1893, though he has not alleged or shown in proof that he has ever reduced his invention to practical use. There would seem to be no doubt, on the proof that Hien's invention was not earlier than the last of November or the first of December, 1893; while, on the part of Buhoup, it is alleged that he conceived the device in issue in July, 1890, and made disclosure thereof to others as early as 1892, and this the proof would seem clearly to establish. And it is clearly shown that Buhoup reduced his device to practical use, by using the round pin with button head in couplers on cars of the Alleghany Valley Railroad for more than two months from about October 5, 1894. About the latter part of December, 1894, it was found that some of these round-shanked pins

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were either bent or broken in the use, and Buhoup then concluded to substitute for the round-shanked pin and button head the square-shanked pin with oblong head, and upon substituting the square-shanked pin, it became necessary to square the holes in the heads of the couplers to receive the square pin. In March, 1895, couplers having this form of pin were applied to cars on the Cincinnati, Jackson and Mackinaw Railroad, and have been in constant use ever since.

It is true, while it is not conceded by Hien, that Buhoup had a conception of any device involving a gravity pin of any kind for the purpose of holding back the locking block when the couplers are uncoupled, prior to the time when he saw Hien's model; yet it is argued on the part of Hien, that even if Buhoup did have a conception of such a device, it was nothing more than the round-shanked pin with button head, such as was first used on the cars of the Alleghany Valley road, and it was, therefore, at most, but a conception of an *inoperative device*, and that the use of these couplers with the round pin amounted to nothing more than an *unsuccessful experiment*, and was not in fact and reality a reduction to practice of *the device in issue*. Hien, therefore, contends that the earliest date that can be given to Buhoup for conception, or reduction to practice of the operative invention of the device in issue, is the date of placing the *square-shanked pin in the couplers* in substitution for the broken or bent pins on the cars of the Alleghany Valley Railroad; and that the principle of this device was derived from seeing the model of Hien. But the testimony in the case would seem to be quite clear that Buhoup did not adopt or pattern after the invention or device of Hien. This is abundantly shown by the testimony of Buhoup himself, and by other witnesses, to say nothing of the force of the circumstances of the case. It is a circumstance of much significance that the substitution and use of the pins with square shanks and oblong heads were also prior to the date of

Hien's application for a patent, or to any attempt on his part to reduce his invention to practical use, although the substitution of the square-shanked pin for the round-shanked pin by Buhoup was after the latter had seen the model of Hien. But that model does not disclose pins with square shanks or any other form of gravity pins, but a gravity leaf, instead. Hien was shown Buhoup's device of a gravity pin, and he was very decided in his opinion that it would not work. He now insists that Buhoup received the idea as to the oblong inclined head to the square-shanked pin from an inspection of the Hien model of the gravity leaf, and that, therefore, the reduction to practice of the device of the square-shanked pin with oblong inclined head should inure to Hien's benefit. But this contention can not be sustained. As said by the Assistant Commissioner of Patents: "The only feature of this pin which it is contended that Buhoup adopted from Hien's model is the form of the head on the pin, that is, the inclined surface. It is true that the 'cam surface' of the square-shank pin is of substantially the same shape as that of the wing leaf of Hien's model; but at the same time it is merely carrying forward of a more mechanically perfect form of the 'button head' pin. As shown, the button head pin had inclined surfaces, and differs from the substituted form only in the angle and the extent of this incline. It is such a change as would naturally be made when it was found that in certain cases the incline on the button head pin was too abrupt to obtain the best results." We entirely agree with the Assistant Commissioner; and our conclusion is the same as that reached by the Assistant Commissioner and the examiners who had previously passed upon the case, that it has not been established that Buhoup appropriated any substantial feature of Hien's invention in making the square-shanked pin with oblong head. To make the change from the round-shanked pin with button head to that of a square-shanked pin with oblong head to overcome a defect in

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operation, was simply a matter of variation in construction, not affecting the substance of the invention claimed by Buhoup; and such change or variation in form could well be made "by mere mechanical skill, without the exercise of the faculty of invention," in order to render more perfect the operation of the original device. *Pickering v. McCullough*, 104 U. S. 310, 319.

It being clearly shown that Buhoup was the first to conceive the device of the issue, and the first to reduce the invention to practice, and was also the first to make application for a patent, he is therefore entitled to priority of invention of the device involved in the issue of interference. Upon the evidence in the case, we discover nothing to support the objection of laches taken to Buhoup's claim.

The decisions of all the tribunals in the Patent Office were in favor of Buhoup's claim; and where such is the case, it must clearly and affirmatively appear that there has been some oversight, or mistake, or wrong construction of material facts, or some mistake or misapplication of some controlling principle of law, to justify this court in reversing the decision appealed from. In this case we find no such error to exist.

*The decision appealed from is therefore affirmed; and the clerk of this court will certify this opinion and the proceedings in the cause to the Commissioner of Patents as required by law.*

## HOWARD

v.

## THE CHESAPEAKE &amp; OHIO RAILWAY COMPANY.

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PLEADING AND PRACTICE; SERVICE OF PROCESS; FOREIGN CORPORATIONS; PLEAS TO THE JURISDICTION; RECEIVERS; AMENDMENT; STATUTE OF LIMITATIONS; HUSBAND AND WIFE; EVIDENCE; RAILROADS; STATE COMITY; LEASE.

1. In a suit against a foreign corporation, a return of the marshal of service on the defendant by service on C. H. C., agent, makes out a *prima facie* case that the defendant was doing business in the District as provided by R. S. D. C., Sec. 790, as well as of the agency of the party so served.
2. Sec. 790, R. S. D. C., providing for the service of process on foreign corporations, was intended merely to afford a means of bringing such corporations before the courts, and does not limit the general jurisdiction of the courts of the District, or prevent their jurisdiction from attaching where such a corporation might appear and answer; *distinguishing* *Ambler v. Archer*, 1 App. D. C. 94.
3. When a judgment by default is entered after pleas to the jurisdiction are stricken out, and the default on motion of the defendant is set aside upon condition that the general issue shall be pleaded, the acceptance of such condition constitutes an abandonment of the pleas to the jurisdiction and any claim of invalidity in the service of the summons, and estops the defendant from afterwards questioning the correctness of the court's ruling in striking out the pleas.
4. The decree of a court of another jurisdiction appointing receivers of a corporation doing business in this District, does not operate as a transfer of the property of the corporation situated here or a discontinuance of its resident office, and service of process upon its local agent is valid when he continues in charge of the office, although after the appointment of the receiver he may be employed by the receiver.
5. The amendment of a declaration against a railroad company for damages for personal injuries, so as to change the form of action from assumpsit to tort, will not open the case to the bar of the statute of limitations.
6. In the absence of proof as to the property rights of a married woman in other States, it will be presumed by the courts of

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this District that the rule of the common law or that in force here with respect of these rights, prevails in such other States.

7. A right of action to recover damages for personal injuries to a married woman is not in this District her separate statutory property, and can not be discharged by her separate release.
8. The general passenger agent of a railroad at the time a lost ticket was printed, may testify as to its contents, although he never saw it, from his recollection of the forms of tickets then in use, all of which had been prepared under his direction.
9. And such a witness in testifying to the contents of a certain excursion ticket, may refer to a single trip ticket to refresh his memory, where he testifies they were identical except as to one condition which related to the return coupon.
10. In the absence of a special contract to the contrary, a selling carrier's duty is completely discharged by a safe carriage to the end of its own line, where a connecting carrier may be ready to continue the transportation on the designated route.
11. Where two railroad companies enter into an arrangement by which practically a continuous system is formed under one management, and one of them sells a ticket under a condition limiting its liability to its own line, it is nevertheless responsible for the safe carriage of passengers over the other line; and such condition must be limited in its operation to such other lines as have their own separate and independent management.
12. The fact that a railroad company had leased its lines to a foreign corporation will not exempt it from liability for an injury done in the operation of the railroad, where the State creating the lessor corporation had not given its consent to the making of the lease.
13. Under State comity, the lease by a railroad company of its lines within the State creating it, to a foreign corporation, will not be recognized by the latter State, where the charter of such foreign corporation prohibits it from operating or owning any railroad in the State in which it was incorporated.

No. 657. Submitted April 13, 1897. Decided November 1, 1897.

HEARING on an appeal by the plaintiffs from a judgment on a verdict directed by the court in an action to recover damages for personal injuries. *Reversed.*

The COURT in its opinion stated the case as follows:

William Howard and Laura P. Howard, his wife, began this suit in the Supreme Court of the District of Columbia,

## Statement of the Case.

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on November 12, 1887, to recover damages for injuries sustained by the said Laura. The declaration alleged that defendant, from and after November 16, 1886, operated a line of railway as a common carrier for hire, between Louisville, Ky., and Washington, D. C.; that defendant, for the customary fare, then and there paid by said Laura P. Howard, contracted with her to safely carry her from Louisville to Washington; that she took passage on defendant's train at Louisville on November 18, 1886, for transportation as aforesaid; that defendant did not carry her safely, but, by reason of the negligence of its employees and the use of defective machinery, caused the car in which she rode to be derailed and thrown down an embankment at or near the station called Soldier, in the State of Kentucky, whereby she sustained permanent injury.

The summons to defendant was returned by the marshal of the District, with the indorsement: "Served the Chesapeake and Ohio Company by service on C. H. Chapin, agent, November 14, 1887."

December 6, 1887, defendant filed two pleas entitled "pleas to the jurisdiction," alleging (1) That it is a foreign corporation, incorporated under the laws of the States of Virginia, and West Virginia, and subject to the jurisdiction of the courts of said States; and that on October 27, 1887, in the Circuit Court of Henrico County, Virginia, and on October 28, in the Circuit Court of Kanawha County, West Virginia, in proceedings in equity in said courts, respectively, of which they had jurisdiction, decrees were passed appointing William C. Wickham receiver of defendant, and delivering to him the possession of all of its property; that said receiver took possession of the property and has operated the defendant's road since said date; and that at the time of the service of summons the said Chapin was not the agent of defendant, nor a person conducting its business, but was the agent of said receiver. (2) That defendant, as such foreign corporation, is subject to the jurisdiction of the

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courts of said States of Virginia and West Virginia, "and does not submit to the jurisdiction of this court, and was not, at the time of the alleged service of the process, November 14, 1887, doing business within the District of Columbia."

The said pleas had not been sworn to, and on January 27, 1890, the court sustained a motion to strike them out, and entered an interlocutory judgment of default with order of inquest by a jury.

On February 15, 1890, the court, on motion of defendant, vacated this order, "for the purpose of permitting the defendant to plead the general issue, and for no other purpose;" and ten days were granted therefor. The plea was promptly filed.

On May 13, 1890, plaintiff filed an amended declaration, substantially the same as the original, but substituting for the allegation therein that defendant had contracted to carry plaintiff for the customary fare paid, &c., the following: "That said Laura P. Howard purchased from the agent of defendant at said city of Louisville a ticket entitling her to passage upon the said railway from the said city of Louisville to the said city of Washington, and the defendant thereby became bound to safely carry her," and so forth.

The defendant filed three pleas to the amended declaration, "not waiving its rights under former pleas:" First, not guilty; second, limitation of three years elapsing between date of injury and the filing of the amended declaration; and third, of accord and satisfaction for that, on November 24, 1886, the said Laura P. Howard, for the sum of \$200, paid to her, had by writing under seal fully discharged defendant of all liability, etc.

The case came to trial on December 22, 1896, and judgment was rendered in favor of defendant upon a verdict directed to be returned by the court. The evidence upon which the verdict was ordered to be returned for the defendant shows the following:

Plaintiff, Laura Howard, lived at Jeffersonville, Indiana,

and in 1886 was a clerk in the Department of Agriculture at Washington. She visited her home on leave in the fall of 1886, and started to return about November 16. Having seen an advertisement in the Louisville Courier-Journal of the schedule of the Chesapeake and Ohio Railway Company, between Louisville and Washington, she concluded to return that way. In the morning she purchased at the office of one Maeder, a "ticket broker or scalper," in Louisville, a coupon return ticket over the Chesapeake and Ohio road from Louisville to Washington, paying therefor \$16.50. She procured a sleeping car berth and had her baggage checked through on said ticket. At 7 p. m., November 16, she entered a car in a train scheduled to leave at 7.30, and designated as "Chesapeake and Ohio train." Her ticket was taken up by the conductor and could not be produced. The car was derailed during the night near Soldier, in the State of Kentucky, and plaintiff sustained injury to her spine that has been pronounced incurable by an eminent specialist. While in New York, under his care, she was visited and examined by another surgeon, Dr. Clymer, at the instance of the defendant. A railway officer who saw the ticket on the day of its purchase said: "It was a Chesapeake and Ohio ticket. It was the return portion of a ticket sold in Washington, good for transportation between Louisville and Washington. The ticket purported to be issued by the Chesapeake and Ohio Railway Company, as appeared on its face."

Advertisements signed by H. W. Fuller, General Passenger Agent of defendant, and published by his authority, were read in evidence. The first, in Washington Daily Post, from July 1 to November 16, 1886, inclusive, showed that the Chesapeake and Ohio Railway leaves B. & P. depot daily for Newport News and other places in Virginia and the west—"solid trains with Pullman sleeper to Louisville." The second, in Courier-Journal, November 13, 1886, was headed "Chesapeake and Ohio Railway," and contained

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among other things the following: "Only line running solid trains between Louisville and Washington," with a schedule showing arrivals in and departures from intermediate cities.

There was testimony tending to show that the derailment of the train was caused by the broken flange of a wheel on one of the cars, and some also tending to show that the car was not in good condition when it started. The first surgeon who treated plaintiff said that he was the surgeon of the Chesapeake and Ohio road. It was proved that Frank Trigg was known in Washington in November, 1886, as local agent of the Chesapeake and Ohio Railway Company. He was in the office of that company at the corner of Sixth street and Pennsylvania avenue, with the sign over the door, "Chesapeake and Ohio Railway Company." Trigg responded to all inquiries concerning the business of the Chesapeake and Ohio Railroad.

A witness (whose deposition, taken by plaintiff, was read by defendant) testified that he sold Mrs. Howard the ticket—"a regular issue of the Chesapeake and Ohio Railway." The form of the ticket was 758c, Number 84, with two or three coupons. "The route was known to the public as Chesapeake and Ohio." He said further: "The names of those roads were changed so often that I didn't keep track of them. The western division terminated at Memphis and the Chesapeake and Ohio eastern division terminated at Washington, although I think they ran over another road from Charlottesville, into Washington, although we termed it C. & O.; and that is what we term the C. & O. route." He further said that he presumed the eastern division of the Newport News and Mississippi Valley Company was in 1886 where it is now, from Lexington to Huntington and Ashland, "but we call that C. & O., and C. & O. tickets were good over that portion of the road, as they are now."

On behalf of the defendant, it was shown that the bag-

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gage car, smoker and ladies' coach of the derailed train had the name, "Newport News and Mississippi Valley Company," along their sides.

The decree of the Circuit Court of Henrico County, Va., rendered October 27, 1887, shows the appointment of Wickham as receiver of the Chesapeake and Ohio Railway, and the acceptance thereof with bond. The suit was entitled Collis P. Huntington, plaintiff, v. The Chesapeake and Ohio Railway Company and the Newport News and Mississippi Valley Company, defendants.

The following receipt was read by the defendant:

"Received, November 24th, 1886, of the Newport News & Mississippi Valley Company two hundred  $\frac{0}{100}$  dollars, in full compromise, satisfaction and discharge of all claims or causes of action to me accrued against them, their lessors or predecessor companies, and particularly of all claims or causes of action arising out of personal injuries received by me while a passenger on the cars of the company near Soldier Station, Kentucky, which occurred on the night of 16th November, 1886. Witness my hand and seal.

"LAURA P. HOWARD. [SEAL.]"

"Witness: C. W. P. BROCK."

Concerning this receipt and the circumstances under which it was executed Mrs. Howard testified:

She was extricated from the car by two men, who lifted her through the window and carried her down a ladder. She was afterwards taken on board the car of the superintendent of the railway, and she was there examined by Dr. Brock, who told her that he was the chief surgeon of the Chesapeake & Ohio Railway Company, and that he was on his annual tour of the railway at that time. She was transferred afterwards from the superintendent's car to another sleeping car and reached Washington City aforesaid early in the morning of November 18th. Witness was taken to 1806 11th street, in said city, where she remained confined to her bed. She was visited there a day or two after her

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arrival by Mr. Frank Trigg, who was the local agent of the Chesapeake & Ohio Railway Company, who conferred with her as to her injuries. The next day Dr. Brock called and offered her \$200, stating that it was for the purpose of "tiding her over the time she was kept from her employment." He presented a paper already prepared for her to sign and she signed it, supposing it to be a receipt for \$200.

The testimony of Henry W. Fuller, General Passenger Agent, is given in full as it appears in the record:

After the appointment of the receiver, November 27th or 28th, 1887, I was the agent of the receiver of the Chesapeake and Ohio Railway. Mr. C. H. Chapin was in the service of the receiver as my direct representative in charge of the passenger business of the road. Mr. Frank Trigg, in November, 1886, was in the service of the Newport News and Mississippi Valley Company.

*Cross-examination:* During the month of November, 1887, I think this same advertisement (the advertisement in the Washington Post) was continued. I do not think that that advertisement was changed any. The place of business of the railroad company in this city was corner of 6th and Pennsylvania avenue. Mr. Chapin, when in his place of business, was in that office. My recollection is that the sign over the door was never changed. It was the Chesapeake and Ohio.

*Redirect:* Before I was in the employ of the Newport News and Mississippi Valley I was in the employ of the Chesapeake and Ohio; am familiar with the tickets from Louisville to Washington. All the tickets were issued under my general direction.

(Witness is handed a railroad ticket to refresh his recollection.)

This is a ticket from Washington to Louisville. It is not a ticket from Washington to Louisville and return. The form number indicates. It is a one-way ticket.

*Recross:* I did not do the detail work of issuing the ticket.

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The forms of all the tickets are passed on by me. I do not handle the detail of writing up the form. I could not say that I had seen or read a return ticket from Washington to Louisville issued about November, 1886, but I can say that we issued round-trip tickets of a certain form. I think I can state from memory the substance of the contents of these tickets at that time. My memory relies on the general system on which my tickets are formed. Each particular ticket has a particular form and number. This ticket has a form and number and an individual number, as you will find at the head of the ticket on each coupon. 758c is the form number of this ticket. There would not be a return ticket of the form 758c; it would have an ex. (excursion) showing. In our system we issue a form of ticket, say, from Washington to Louisville, and that will be a 10c, for instance. We will issue another form of round-trip ticket over the same route, and it will be the same form, except that it will have the prefix ex., so that we have two forms, one straight and one round-trip. The round-trip would differ from the other only in having the reverse coupon and ex. I am able to testify to that from our general course of business. I read the tickets when they are prepared, but I could not locate them of any particular day or month.

(Thereupon witness was permitted to refresh his recollection from the ticket offered, and was then asked to testify as to what the return ticket would contain. To the asking of this question counsel for the plaintiffs objected, on the ground that the same called for incompetent matter; but the trial justice overruled the said objection and permitted the said witness to answer the same—which ruling the counsel for the plaintiffs then and there excepted, and the trial justice entered the same upon his minutes.)

The return coupons of the ticket issues at that time corresponding to this would read: Louisville to Lexington by the L. & N.; Lexington to Huntington by the Elizabeth-

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town, Lexington and Big Sandy; Huntington to Charlottesville by the Chesapeake and Ohio or Newport News and Mississippi Valley, as the case may have been; Charlottesville to Washington by Virginia Midland.

Q. Will you read the contract at the head of the ticket and tell me whether any language corresponding to that, and, if so, what language, was on the return ticket?

(Same objection and exception noted.)

A. The return coupon of the contract would differ in some respects. It contains the main features, but contains a special round-trip contract. It would say that it was only good for return if presented in a certain number of days, but it would contain the same general features, the same language as at the head of this ticket.

(Same objection and exception noted.)

All the forms of tickets would contain that contract. The round-trip ticket would have a slight difference that the ticket would have to be used in a certain number of days. It reads: Washington to Louisville, Ky., via N. M., C. & O., E., L. & B. S., L. & N. The form is 758c. The return ticket would have the letters prefixed of e x, meaning excursion, form 758c. The next is Chesapeake & Ohio railway, good for one continuous first-class passage. Washington to Louisville, as per coupons attached. The other would read that way, subject to the following conditions, and the contract is as follows: "In selling this ticket for passage over other roads this company acts only as agent and assumes no responsibility beyond its own line. . . . None of the companies represented on this ticket will assume any liability on baggage except for wearing apparel, and then only for a sum not exceeding \$100. No stop-off check will be issued on this ticket. Signed H. W. Fuller, general passenger and ticket agent." The next is a coupon as follows: Issued by Chesapeake and Ohio Railroad Co. on account of L. & N. railroad. One first-class passage, Lexington to Louisville. The check is not good if detached.

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Washington to Louisville, Ky., via V. M., C. & O., E., L. & B. S., L. & N. The next coupon is as follows:

Issued by C. & O. railway on account of E., L. & B. S. R. R., one first-class passage, Huntington to Lexington; this check is not good if detached. Washington to Louisville, Ky., via V. M., C. & O., E., L. & B. S., L. & N. The next coupon reads: C. & O. railway; one first-class passage, Charlottesville to Huntington; this check is not good if detached. Washington to Louisville, Ky., via N. V. M., C. & O., E., L. & B. S., L. & N.; on margin, 857c; that appears on all coupons. The next coupon is as follows:

Issued by C. & O. railway on account of Virginia Midland railway, one first-class passage Washington to Charlottesville; this ticket is not good if detached. Washington to Louisville, Ky., V. M., C. & O., E., L. & B. S. & L. In every case where it is issued on account of another railroad the same words would appear on the return coupon.

Counsel for plaintiffs thereupon moved to strike out all the testimony of the witness in respect of the contents of the ticket in evidence as being incompetent; but the said motion was overruled by the court; to which ruling the counsel for the plaintiff then and there excepted, and the trial justice entered the same upon his minutes; and the said witness further testified as follows:

Did not post the announcement of the appointment of the receiver in the office; they were simply sent to our agents, and I don't know whether they were posted or not.

*Recross:* (Witness is shown combined maps and circulars marked Exhibit 18, A. I. T. T., to deposition of Mr. Wickham.) Whatever there is of good, bad or indifferent in that I am responsible for as general passenger agent of the railroad. I ceased to be employed by the Chesapeake and Ohio road immediately on the formation of the Newport News and Mississippi Valley Co. in July, 1886. That company was organized under a Connecticut corporation. It is rather out of my knowledge. I did not hold any of

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the stock and never saw any of it. The Newport News and Mississippi Valley Co. acquired its equipment by purchase from the various companies composing it—the Chesapeake and Ohio, the Elizabethtown, Lexington and Big Sandy, the Chesapeake and Ohio and Southwestern. Upon the dissolution of the Newport News and Mississippi Valley the rolling stock was turned back to the original companies that contributed it.

Q. I show you this circular which you say you are responsible for; on that page, under date November 21, 1886, you will see Chesapeake and Ohio Railroad Co. running solid through trains between Washington and Louisville.

A. That should have been Chesapeake and Ohio route. The solid trains running between Washington and Louisville was correct. We ran one train a day at that time between Washington and Louisville composed of a baggage car, two coaches, and a Pullman sleeper, and also one from Louisville to Washington. Just before the road went into the hands of the receiver I was in the employ of the Newport News and Mississippi Valley Company. Mr. Chapin was in the employ of the same company, and before that in the employ of the Chesapeake and Ohio Company. Mr. Chapin was then also employed by the Chesapeake and Ohio. I commenced my employment with the Chesapeake and Ohio Company fourteen years ago, in 1882 or 1883. Some three or four years after that they opened an office in Washington. Mr. C. P. Huntington was president at that time. We located our office here, at 513 Pennsylvania avenue, and have never moved from there, the corner of 6th and Pennsylvania avenue. They put the name Chesapeake and Ohio Railway ticket office on the windows and over the doors. No changes have been made in the signs except in colors and style; we try to improve them occasionally. As to the other advertisements (the newspapers), at the time we were operated by the Newport News and Mississippi Valley Company, for reasons I explained, purely advertising

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reasons, we always continued to use Chesapeake and Ohio Railway—Chesapeake and Ohio Route. Could not say that from the time I commenced, in 1882, I ever advertised that I was the general passenger agent of the Newport News and Mississippi Valley Company; never took down the sign C. & O. railway passenger office; don't think the sign was ever changed. Mr. Chapin had been in my service for several years before 1887. As to the ticket about which I testified, from the course of business the return form would have these coupons on it, and each coupon would have at its head issued by the C. & O. R. R. on account of the particular road that appeared on the different coupons. I say that it would be issued under the name of the Chesapeake and Ohio, because they were some old forms we had on hand and wanted to use them up. We were running one through train at that time under certain traffic arrangements with certain lines on which we operated. We ran between here and Charlottesville over the Virginia Midland Railway, thence over Chesapeake and Ohio or Newport News and Mississippi Valley, Eastern division, to Lexington, and thence to Louisville, on L. & N. At the time I first became its employee the Chesapeake and Ohio ran from Richmond to Huntington. To-day it runs from Newport News to Norfolk, by ferry connection to Lexington, Ky., by wheelage contract to Washington. Just before I ceased to be employed by the Chesapeake and Ohio Company and went into the employ of the Newport News and Mississippi Valley Company we had this run from Huntington to Lexington. Our line at that time extended from Lexington to Newport News and Old Point Comfort. We had been operating the Elizabethtown, Lexington and Big Sandy road; it was simply turned over to us to operate. After the change to the Newport News and Mississippi Valley, Mr. Huntington was president all the time and I continued as general passenger agent. The Virginia Midland hauled our train from Washington to Charlottesville under an arrangement by which they would receive in payment what-

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ever proportion of the business might be coming to them, and the same train was hauled from Charlottesville to Lexington under a similar agreement and from Lexington to Louisville under a contract with the Louisville and Nashville road. We had no contracts for running cars to St. Louis, San Francisco, or elsewhere. I don't think there was a contract in existence at that time between the Chesapeake and Ohio and the Virginia Midland, except an understanding that during the summer months certain cars would be called from the White Sulphur and through to Louisville.

(Advertisement in Washington Post is read to witness.)

At the time of these advertisements we were only sending out one train from the Baltimore and Potomac station. We had the authority of an arrangement with the Virginia Midland Company. I could not give it in detail. It was a special arrangement between us and the Virginia Midland. We paid no consideration for it. They took their proportion of the ticket business. They did local business on it all the way to Charlottesville. There was not a C. & O. employee on the train. From Charlottesville to Lexington it was hauled over our own railway; that is a different sort of thing. We called it at times the Chesapeake and Ohio; at other times it was the Newport News and Mississippi Valley Company. The Virginia Midland got its proportion of the through-ticket price and we got ours. Our cars went from Lexington to Louisville under an arrangement with the Louisville and Nashville to take through cars. We had contracts with other roads than the Virginia Midland and the Louisville and Nashville. We have a contract with the Pennsylvania railroad to take our trains solid to New York City, and we go into their station in New York by an arrangement and contract with them. It is their train from Washington; we simply turn it over to them and they take what is in it. We have these contracts only with companies over whose roads we send through trains.

When the receiver was appointed for the Chesapeake and Ohio Railroad Company the Newport News and Mississippi Valley Company at once turned over to said receiver the road-bed and all the rolling stock and equipment of the said Chesapeake and Ohio Railway Company. The said receiver was ultimately discharged and the said railroad company was again operated by its own officers.

Witness identified the following advertisement as being authorized by him, and the defendant's counsel offered it in evidence. Counsel for plaintiffs objected to its admission, but the court overruled the objection; to which ruling counsel for plaintiffs excepted, and the presiding judge then and there noted the said exception on his minutes:

Washington Post, November 23rd, 1886.

Chesapeake and Ohio route.

(Newport News and Mississippi Valley Company.)

Union Depot, Sixth and B streets.

11 a. m. for Newport News, Old Point Comfort, and Norfolk, 7 p. m.

9 a. m., for all stations on the Chesapeake and Ohio and points West. Sleeper from Clifton Forge daily except Sunday.

5.30 p. m., fast Western express, daily. Solid train, with Pullman sleeper, to Louisville. Pullman service to Cincinnati and St. Louis, Memphis and New Orleans.

Apply at C. & O. Railway Office, 513 Pennsylvania avenue, and B. & P. Station.

H. W. FULLER,

*General Passenger Agent.*

FRANK TRIGG,

*General N. E. Pass. Ag't.*

The history of the several corporations engaged from time to time in operating the "Chesapeake and Ohio route" is given in the testimony of Henry T. Wickham, Esq., a witness for the defendant, as follows:

Am a lawyer and director and general solicitor of the

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Chesapeake and Ohio Railway Company; entered the service of the company in 1874; in January, 1886, was appointed general solicitor, and was made a director in 1888. The line of road constructed under the charter of the Chesapeake and Ohio Railway Company extends from Fortress Monroe, Virginia, to the west bank of the Big Sandy river. Soldier is a station on the line of the Elizabethtown, Lexington and Big Sandy Railroad Company, in Carter County, Kentucky, about 58 or 60 miles west of the Big Sandy river. The Elizabethtown, Lexington and Big Sandy Railroad Company is a corporation chartered under the laws of the State of Kentucky.

Am entirely familiar with the history of that road. The charter was amended in 1870 so as to give the company power to make contracts with other roads and to lease its line. It was further amended in 1871 to authorize the company to have a terminal in Louisville, and in 1872 an act was passed by the Kentucky Legislature authorizing the Elizabethtown, Lexington and Big Sandy Railroad Company and the Chesapeake and Ohio Railroad Company to bridge the Big Sandy river. (Copies of these acts placed in evidence.) Under these acts the line of the Elizabethtown, Lexington and Big Sandy Railroad Company was constructed from Lexington, Kentucky, to the west bank of the Big Sandy river, terminal facilities in Louisville, Kentucky, being provided by contract between the Elizabethtown, Lexington and Big Sandy Railroad Company, the Louisville and Nashville Railroad Company, and the Chesapeake and Ohio and Southwestern Railroad Company, dated December 28, 1881. (Copy of which contract is placed in evidence.) On November 12th, 1879, an agreement was made between the Chesapeake and Ohio Railway Company and the Elizabethtown, Lexington and Big Sandy Railroad Company the substance of which was that the Chesapeake and Ohio Railway Company, whose line then terminated at Huntington, West Virginia, should extend its line eight or nine miles

from Huntington to the west bank of the Big Sandy river, building a bridge across the Big Sandy river, and that the Elizabethtown, Lexington and Big Sandy Railroad Company, whose line then terminated at Mt. Sterling, in Montgomery County, Kentucky, should build and complete the line from Mt. Sterling to the Big Sandy river to a connection or point of junction with the Chesapeake and Ohio Railway. It was also agreed that the Elizabethtown, Lexington and Big Sandy River Railroad should be allowed the free use of the eight miles of road, including the bridge, into the depot of the Chesapeake and Ohio Railway Company, with terminal facilities at Huntington, for a term of five years from the date of the completion of the road between Huntington and the Big Sandy river. The road was completed between Huntington and the Big Sandy river early in 1882, according to my recollection. Am familiar with the history of the Mississippi Valley Company. Collis P. Huntington, a native of the State of Connecticut, was largely interested and the controlling spirit in a number of railroads, both west and east of the Mississippi. He had a plan for bringing into practically one management a line of road extending from the Atlantic to the Pacific. He consolidated his lines west of the Mississippi under the name of the Southern Pacific Company. In the progress of this plan he got a charter from the State of Connecticut under the name of the Southern Pacific Company, which name, as regards the lines east of the Mississippi river, was subsequently changed by the Connecticut Legislature to the Newport News and Mississippi Valley Company.

(Copy of which charter is by consent made part of the deposition.)

He organized his lines east of the Mississippi river, consisting of the Chesapeake and Ohio Railway Company, the Elizabethtown, Lexington and Big Sandy Railroad Company, and the Chesapeake and Ohio and Southwestern Railroad Company. The dates of the various acts constituting

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the charter of the Newport News and Mississippi Valley Company are March 27, 1884, incorporating the Southern Pacific Company; March 10, 1885, changing the name to the Newport News and Mississippi Valley Company, and an amendatory act approved April 27, 1887. The Newport News and Mississippi Valley Company had organized and taken a number of leases from the foregoing companies, when a question arose as to the provisions of the original act, approved March 27, 1884, which provided that the Newport News and Mississippi Valley Company should not have the power to make joint stock with, own, hold, or operate any railroad in the State of Connecticut. The amendment of April 27, 1887, added these words: "unless such railroad shall be held, owned, or operated within said State in conformity with the provisions of the general law of the State." I was the general solicitor of the Newport News and Mississippi Valley Company.

(Witness hands the examiner copies of leases from the Elizabethtown, Lexington and Big Sandy Railroad Company and the Chesapeake and Ohio Company to the Newport News and Mississippi Valley Company, which by consent are made part of his deposition.)

(The lease from the Elizabethtown, Lexington and Big Sandy Railroad Company to the Newport News and Mississippi Valley Company is dated January 29, 1886, and provides in substance that the lessor leases to the lessee for a period of 250 years from the 1st day of February, 1886, the railroad extending from Lexington, Kentucky, to the west side of the Big Sandy river, together with its rights and privileges issuing out of the contracts with the Ashland Coal and Iron Company and with the Chesapeake and Ohio Company in respect of the railroad from the west bank of the Big Sandy river to Huntington, the lessee agreeing to pay \$5,000 per annum rent.

The lease from the Chesapeake and Ohio to the Newport News and Mississippi Valley Company provides that the

Chesapeake and Ohio Company leases to the Newport News and Mississippi Valley Company for a period of 250 years from July 1, 1886, its railroads from Phœbus, Virginia, to Huntington, West Virginia, together with its rights and privileges arising out of its agreement with the Elizabethtown, Lexington and Big Sandy Railroad Company in respect of the railroad between Huntington and the west side of the Big Sandy river, for an annual rental of \$5,000.

It is signed by Chesapeake and Ohio Railroad Company, C. P. Huntington, president; and Newport News and Mississippi Valley Company, C. P. Huntington, president.)

And thereupon the witness further testified as follows:

The Chesapeake and Ohio Railroad Company got into financial difficulties and was put into the hands of a receiver by the decrees of the Circuit Court of Henrico and the Circuit Court of the County of Kanawha on the 27th and 28th days of October, 1887, respectively, but from the date of the lease to the date of the decrees aforesaid, when the property was placed in the hands of a receiver by the court, the Newport News and Mississippi Valley Company operated the Chesapeake and Ohio Company, but after the appointment of the receiver the Newport News and Mississippi Valley Company had nothing whatever to do with the Chesapeake and Ohio Railway Company, but continued to operate the Elizabethtown, Lexington and Big Sandy Railroad Company under the lease.

My connection with the Newport News and Mississippi Valley Company terminated with the appointment of the receiver. I then became general solicitor for the receiver. The Newport News and Mississippi Valley Company continued to operate the Elizabethtown, Lexington and Big Sandy Company until 1892, I think.

(The various charters, acts and conveyances showing the limits of the Chesapeake and Ohio Railway Company are by consent placed in evidence.)

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The Chesapeake and Ohio Company had nothing to do with the operation of the Elizabethtown, Lexington and Big Sandy Railway, while the Newport News and Mississippi Valley Company was operating it.

*Cross-examination*: Mr. Huntington controlled a number of disconnected roads both east and west of the Mississippi, which he desired to bring under one management, that of himself. He organized the lines west of the Mississippi under the charter of the Southern Pacific Company; those east of the Mississippi under the charter of the Newport News and Mississippi Valley Company. Mr. Huntington at the date of the leases was the president of the Chesapeake and Ohio Railroad Company and the president of the Newport News and Mississippi Valley Company. Mr. Reid was president of the Elizabethtown, Lexington and Big Sandy Company, but Mr. Huntington controlled both these roads in that he owned a very large portion of the stock and controlled most of that which he did not own. In one sense it was all under his control, but not in the sense of their being the same legal entities.

Thereupon the witness was shown a map and circular.

(This is in one of the forms of the ordinary "railway folder," and bears date November 21, 1886. On one side is a map of the United States showing railway lines and connections, and is entitled "Map of the Chesapeake and Ohio Route." A broad and heavily shaded line, designated as "Chesapeake and Ohio Railway" extends from Louisville, Kentucky, to Newport News and to Washington. On the reverse side, as folded, appear pictures and reading matter descriptive of the route and connections with accompanying time tables between Washington and Louisville and Cincinnati. Among the inscriptions thereon in large type appear: Time Table C. & O. Newport News and Mississippi Valley Co., W. C. Wickham, Second Vice President. H. W. Fuller, General Passenger Agent, Richmond, Virginia. Chesapeake and Ohio Route. Only line running solid trains between

Washington and Louisville. The solid train for Louisville and Cincinnati.)

Whereupon witness answered: This map and time-table was given to the public by the authority of H. W. Fuller, general passenger agent of the Newport News and Mississippi Valley Company, approved by John Muir, general traffic manager, and W. C. Wickham, second vice president; they had charge of the running of the road. It is dated Nov. 21st, 1886. I presume it is substantially what was in effect before that time, with the exception of changes in times of trains, connections, etc. The company gave out that publication because the trade-mark, as it were, of the system was the "C. & O. route." It was a well-known line and was being pushed and advertised for all it was worth. Through trains were run upon this route prior to the lease under an arrangement by which it was practically a continuous system. After the contract of November 12th, 1879, between the Chesapeake and Ohio Railway Company and the Elizabethtown, Lexington and Big Sandy Railroad Company, the former built the eight miles of road, including the bridge across the Big Sandy river, from Huntington to the west bank of the Big Sandy river, the latter completing its line to a junction or point of connection at the west bank of the Big Sandy, as I have said before, in the early part of 1882. The properties were then operated together by one general manager, Mr. C. W. Smith, under the verbal directions of Mr. C. P. Huntington, I have always understood, who was president of the Chesapeake and Ohio Company and controlled a majority of the stock of the Elizabethtown, Lexington and Big Sandy Railroad Company. Under the arrangement the officers of the Chesapeake and Ohio Company operated and maintained a line of railroad for and on account of the Elizabethtown, Lexington and Big Sandy Railroad Company from the west bank of the Big Sandy river to Lexington, and included in that also the eight

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miles of track between the west bank of the Big Sandy river and Huntington. They operated it, as I have said, for and on account of the Elizabethtown, Lexington and Big Sandy Railroad Company, keeping an account on the books of the Chesapeake and Ohio Railroad Company of all receipts of every character between Huntington and Lexington, including also the Louisville connection, and charged to the Elizabethtown, Lexington and Big Sandy Railway Company all disbursements in that part of the line. The arrangement continued in effect until the organization of the Newport News and Mississippi Valley Company, when its operating officers, who were General Wickham and Mr. Fuller, operated the properties under the leases. The duration of this contract was five years from the date of the completion of the road, which was in the early part of 1882, which would have made the duration until 1887. The organization of the Newport News and Mississippi Valley Company terminated the contract, I suppose by force of the arrangement then made. It was terminated in the same manner it was made, by direction of Mr. Huntington. Mr. Huntington directed Mr. Smith to operate the properties, as I have indicated, and upon the formation of the Newport News and Mississippi Valley Company and the execution of the leases he directed the operation of the line to be had in accordance with these leases. Mr. Huntington undoubtedly controlled the whole enterprise, in that he held a controlling interest in each company. He was president of the Chesapeake and Ohio Railroad Company, the president of the Newport News and Mississippi Valley Company, and Mr. Reid, who was president of the Elizabethtown, Lexington and Big Sandy Company, acted always in Mr. Huntington's interest. The leases were prepared under the direction of Mr. Huntington and expressed, as far as they went, his desires toward the completion of the plan he entertained. This accident happened, I believed, on November 16th or morning of November 17th, 1886. When the lease went into effect it might be pos-

sible that there was on hand an old stock of Chesapeake and Ohio tickets, but my impression is that this issue of tickets must have been exhausted by the time of the accident and been substituted by Newport News and Mississippi Valley Company tickets. At the time of the accident tickets were issued in the name of the Newport News and Mississippi Valley Company, as far as I know. Prior to the organization of the Newport News and Mississippi Valley Company the tickets were issued in the name of the Chesapeake and Ohio route, I think; am not sure whether they specified Chesapeake and Ohio Railway Company or the Chesapeake and Ohio route. The line was operated as I have said. It was known to the public as the Chesapeake and Ohio route or road. If any of the Chesapeake and Ohio tickets were outstanding at the time of the new arrangement, I am inclined to think that the Newport News and Mississippi Valley Company would have had the right to refuse to honor such tickets. If the company did honor such a ticket, then the possessor of the ticket got ahead of the Newport News and Mississippi Valley Company by that much unless an agent of the Newport News and Mississippi Valley Company had sold it. If the passenger was rightfully on the train, the Newport News and Mississippi Valley Company undoubtedly would have been liable for a breach of its duty as a common carrier if any accident happened by the negligence of that company. Mrs. Howard's case was referred to me. I was general solicitor of the Newport News and Mississippi Valley Company at that time. Mr. Charles H. Tweed was at that time general counsel of the Newport News and Mississippi Valley Company in New York. He was also Mr. Huntington's lawyer.

(Witness is shown the following letter:)

"Chesapeake and Ohio Railway Company, Mills building,  
seventh floor, room 1, Chas. H. Tweed, counsel.

"NEW YORK, March 7th, 1887.

"W. L. ARMSTRONG, 71 Broadway.

"DEAR SIR: Referring to your letter of 25th ult. to Mr.

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Huntington in regard to claim of Mrs. L. P. Howard, which you inform me has been placed in the hands of Mr. J. H. Judge, I should be very much obliged if you would ask Mr. Judge if he would have any objection to Dr. Meredith Clymer visiting Mrs. Howard, and if he has no objection thereto, whether he will send me such a note as will secure Dr. Clymer an opportunity of seeing her.

“Yours very truly,

“CHAS. H. TWEED.”

I recognize the signature of Mr. Tweed.

(Letter read in evidence.)

I do not think the Chesapeake and Ohio Company made any offer of settlement with Mrs. Howard. I remember very distinctly that as general solicitor of the Newport News and Mississippi Valley Company I directed the chief surgeon of that company, Dr. Brock, to see her in Washington. He did see her and paid her \$200 in settlement of her claim, which I vouched.

Soldier, where this accident occurred, is in the State of Kentucky and a station on the line of the Elizabethtown, Lexington and Big Sandy railroad about fifty miles west of the Big Sandy river. It is between Huntington and Lexington.

A number of instructions were asked by the plaintiffs, all of which were refused. Without giving these, it is sufficient to say that they covered the points, in application to the evidence, upon which the plaintiff relied. The court then ordered the jury to return a verdict for defendant.

*Mr. R. Ross Perry, Mr. James Francis Smith and Mr. R. Ross Perry, Jr., for the appellants:*

1. The return, by an officer competent to serve a return and writ of summons, of the fact and mode of service, if in due form of law, is conclusive upon the parties to the record, in all proceedings, except in an action against the officer for a false return. 6 Thompson on Corp., Sec. 7507. The

proper course for the defendants to have pursued would have been to have moved to vacate the service of the writ in question. As the defendant did not do this, but pleaded, as has been seen, to the jurisdiction, the said pleas were to be strictly construed. There was no error in the order by which the said pleas to the jurisdiction were stricken out and judgment by default given against the defendant, and a jury of inquest ordered. In this condition of things the defendant's course was clear. If the court had no jurisdiction the judgment was a nullity. If the defendant had no property within the jurisdiction, it could not even have been put to inconvenience by the issuance of an execution. Instead, however, of relying upon the alleged want of jurisdiction, the defendant made a motion to have the judgment by default set aside. This was done, and in the same order leave was granted to the defendants to plead the general issue. Accordingly the defendant, under the said permission, formally pleaded the general issue. Upon this point *Railroad Co. v. Brown*, 17 Wall. 445, 448, 450, is conclusive.

2. That the mere appointment of a receiver does not *ipso facto* dissolve the corporation for which it is appointed is well-settled law. Am. & Eng. Encyc. of Law, 278; *Kincaid v. Dwinelle*, 59 N. Y. 548; *Pringle v. Woolworth*, 90 N. Y. 502; *Taylor v. Insurance Co.*, 14 Allen, 353; *Jones v. Bank*, 11 Colo. 464; *Hunt v. Insurance Co.*, 55 Me. 290; *Mosely v. Burrow*, 52 Tex. 396; *State v. Merchant*, 37 Ohio St. 251; *Davis v. Gray*, 16 Wall. 203; *Railroad v. Brown*, 17 Wall. 445; *Railroad Co. v. Jones*, 155 U. S. 333.

"Receivers appointed by one jurisdiction are not entitled, as of right, to recognition in other jurisdictions; and courts of equity can not acquire extra-territorial jurisdiction over property by appointing receivers." 20 Am. & Eng. Encyc. of Law, 65, 66; *Atkins v. Railroad Co.*, 29 Fed. R. 173; *Booth v. Clark*, 17 How. 335.

3. The conclusions as to the liability of a carrier selling a through ticket over several connecting roads to a point

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beyond its own lines are by no means harmonious. The English doctrine, and that of some of the States, is that the carrier is liable for the performance of the contract of transportation through to the point of destination, and must therefore respond in damages in the event of the injury or delay of a passenger before reaching that point. 25 Am. and Eng. Encyc. of Law, 1085, 1086, and cases under note 2. The majority of our courts, however, have held, in accordance with what is called the American rule, that the mere acceptance of goods directed to a point off the carrier's line is not a sufficient basis for the implication of a contract for extra-terminal liability, and that, in the absence of an express contract, or of more significant facts or specifications than the fact of acceptance as the basis of an implied contract, the initial carrier is discharged by carrying safely to the end of its line and there delivering to the next carrier. 4 Elliott on Railroads, 2227, and cases under note 2; 25 Am. and Eng. Encyc. of Law, 1086, and authorities under note 3.

The contract of through carriage may, however, be implied. As to what will, under the American rule, constitute a sufficient basis for the implication of a contract nothing very definite can be said. A contract will not necessarily be implied even from the shipper's payment or guarantee to the initial carrier of through freight. An undertaking, however, in the receipt for the goods, to forward them beyond its line, is generally held to bind the initial carrier for the entire carriage. And the fact that the initial carrier named the through rate and collected the entire charge has been held, in some jurisdictions, to be a circumstance strongly tending to show a contract for through transportation by it, or such a connection in business as to make the first carrier liable over the entire route. As illustrations of circumstances which will constitute such a contract, the following cases are referred to: *Quinby v. Vanderbilt*, 17 N. Y. 306; *Railway Co. v. Tisdale*, 74 Tex. 8; *Beggs v. Narragansett Co.*, 5 Daly,

394; *Candee v. Railroad Co.*, 21 Wis. 582; *Manufacturing Co. v. Railroad Co.*, 104 Mass. 122; *Woodward v. Railroad Co.*, 1 Biss. 403; *Page v. Railroad Co.*, 64 N. W. Rep. 137; *Lock Co. v. Railroad Co.*, 48 N. H. 339; *Railroad Co. v. Pratt*, 22 Wall. 123.

The passage ticket, in the ordinary form, is merely a voucher, token, or receipt, adopted for convenience, to show that the passenger has paid his fare from one place to another, and does not constitute the contract of carriage, although it may and often does have upon it some condition or limitation which enters into and forms a part of the contract. Accordingly, it is admissible to prove by parol evidence the terms of the contract in fact entered into between the carrier and the passenger. 25 Am. & Eng. Encyc. of Law, 1075, and authorities cited under note 1. It necessarily follows that parol evidence may also be given of all the circumstances under which the ticket was purchased. What the real contract was will be shown not by the ticket alone, but by the ticket connected with the advertisements to the public authorized and made by the railroad company on the faith of which the public purchase tickets.

While the liability of a common carrier of goods is that of an insurer, and therefore greater than that of a common carrier of passengers, yet, when the question is concerning the contract of carriage, there is no difference. *Myrick v. Railway Co.*, 107 U. S. 102, 107. See also in this connection 2 L. R. A. 84, 85, 252, and notes. With respect to the policy of the law, in considering provisions inserted by common carriers in receipts, tickets, notices, and similar instruments, see *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318, 329.

As conclusions from authorities quoted, it may be admitted that where two or more railroads form an agreement in consequence of which they run through trains from point to point, the mere fact that they do run such through trains will not make one liable for the negligence of the other, where there is no partnership or agreement tantamount thereto existing between the said companies. That is, how-

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ever, not the case which is involved here. Upon any theory of this case, the learned trial justice should have submitted to the jury the question as to what contract was in fact made or implied under all the circumstances of the case by the purchase of the railroad ticket in question here. *Myrick v. Railroad Co.*, 107 U. S. 102, 107.

4. Inasmuch as the plaintiff bought a Chesapeake and Ohio railroad ticket, under the circumstances shown by the evidence in this case—to wit, the advertisements by the defendant in the public press, the circulation by it of the railroad map and circular set out in the record, and the “pushing of the said Chesapeake and Ohio railroad route for all it was worth”—the defendant company is estopped from asserting that it was not in point of fact itself operating a through line from Louisville to Washington and return in November, 1886. *Railroad Co. v. Brown*. 17 Wall. 445, 451.

The most that can be said by the defendant, in opposition to the plaintiff's claim upon this theory of the case, is that a jury might have inferred, from the testimony in the case, that the ticket actually bought by Mrs. Howard contained statements to the effect that the defendant was not a through carrier, and that it stipulated against liability for any negligence but its own. Certainly, however, even on this hypothesis, it was the province of the jury to determine whether or not the purchaser of a ticket had a right to rely on the general conduct and advertisements of the defendant, rather than upon a printed form of statement contained in a ticket. So far as the stipulation against liability for negligence is concerned, it may very well be satisfied by interpreting it as exempting the defendant from liability by reason of defects in the road-beds of the subordinate railroads, if, indeed, it could operate to that extent. If the position of the defendant was that of a through carrier, then certainly any stipulation in the ticket against its own negligence, in providing improper cars or improperly running its own train over the roads of subordinate and con-

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necting carriers, would be invalid. This is well-settled law. *Hart v. Railroad Co.*, 112 U.S. 331, 338. Besides, the injury resulted from the defendant's own negligence, the accident being caused by a broken flange on a wheel of a car of the train. The stipulation was therefore immaterial, because it was a stipulation against liability for the negligence of others. It can not escape liability for its negligence in furnishing such car, by the fact that the car was running over subordinate and connecting roads. Upon this point counsel refer to the statement contained in 4 Elliott on Railroads, 2450, the latest text-book on the subject, and to the following authorities as illustrating the statement of the text: *Railroad Co. v. Tisdale*, 74 Texas, 8; *Chollette v. Railroad Co.*, 26 Neb. 159; *Washington v. Railroad Co.* 101 N. C. 239; *Railway Co. v. Groves*, 44 Pac. R. 628; *Howe v. Gibson*, 3 Tex. Civ. App. 263; *Webb v. Railroad Co.*, 57 Maine, 117; *Railroad Co. v. Barron*, 5 Wall. 90, 104; *Block v. Railroad Co.*, 139 Mass. 308; *Tillett v. Railroad Co.*, 24 S. E. Rep. 111; *Murray v. Railroad Co.*, 66 Conn. 512; *Railroad Co. v. Ross*, 27 S. W. Rep. 728; *Railroad Co. v. Bond*, 20 S. W. Rep. 930; *Martin v. Railroad Co.*, 26 S. W. Rep. 801; *Barkington v. Railroad*, 19 S. E. Rep. 915; *Railroad Co. v. Garrison*, 30 Fla. 557.

*Mr. W. H. Payne, Mr. Leigh Robinson and Mr. W. Willoughby* for the appellee:

1. The sale of a coupon ticket entitling the purchaser to passage over lines connecting with the carrier selling the ticket, in the absence of express contract otherwise, creates no different duty and liability from that which would accrue had the passenger purchased a ticket at the office of each company constituting the through line. *Railroad Co. v. Schwarzenberger*, 45 Pa. St. 208; *Hartan v. Railroad Co.*, 114 Mass. 47; *Railroad Co. v. Connell*, 112 Ill. 295.

The law relating to bills of lading has no application here, for the effect of a bill of lading is not matter of impli-

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cation, but an agreement in writing delivered by one party and accepted by the other, so as to be a binding contract, which defines their rights and liabilities. Yet even in the case of freight, the general rule is that a carrier is not liable beyond its own line, unless by contract. The fact alone that it has received goods marked for a place beyond its own terminus does not import an agreement to transport to the destination named as common carrier, and this because in the absence of an express contract it is not a common carrier beyond its own line, and the law does not compel it to act as a common carrier over other lines not within its control. *Hunter v. Railroad*, 76 Tex. 195; *Sumner v. Walker*, 30 Fed. Rep. 261; *McConnell v. Railroad*, 86 Va. 248.

It is proper, however, to bear in mind the distinction in the law of liability governing the transportation of freight and that governing the transportation of passengers. Authorities pertinent to the former do not necessarily apply to the latter. The distinction is clearly stated in 2 Redfield on Railways, Sec. 201. See also Hutchinson on Carriers, Sec. 578. This distinction eliminates from consideration such authorities as relate to freight or baggage. As to passengers the law is that a through ticket over several distinct lines of passenger transportation issued in the form of three tickets on one piece of paper and recognized by the proprietors of each line is to be regarded as a distinct ticket for each line. The rights of a passenger purchasing such a ticket and the liabilities of the proprietors of the several lines recognizing its validity are the same as if the purchase had been made at the ticket office of the respective lines. *Knight v. Railroad Co.*, 56 Me. 234; *Milnor v. Railroad Co.*, 53 N. Y. 369. See also *Railroad Co. v. Manufacturing Co.*, 16 Wall. 324; *Myrick v. Railroad Co.*, 107 U. S. 107; *Mosher v. Railroad Co.*, 127 U. S. 390; 2 Wood's Railway Law, Sec. 359; 25 Am. & Eng. Encyc. L. 1086.

2. The express contract in this case is not modified by the advertisements. *Hood v. Railroad Co.*, 22 Conn. 10-12.

Nor by the map and the ownership of stock. *Railroad Co. v. Jones*, 155 U. S. 333; *Pullman Car Co. v. Mo. Pacific Co.*, 115 U. S. 594.

3. The lease of a railroad, when authorized by law, renders the lessee exclusively liable for all injuries occurring on the line of the leased road subsequent to the lease. 2 Elliott on Railroads, Sec. 469; Hutchinson on Carriers, Sec. 515*b*; Pierce on Railroads, 283; *Day v. Railroad Co.*, 107 N. Y. 140; *Railroad Co. v. Ely*, 65 Pa. St. 205; *Mahoney v. Railroad Co.*, 63 Me. 68; *Railroad Co. v. Washington*, 86 Va. 635. The consolidation of two or more railroad companies, under authority of statute, works a dissolution of the old corporations and the creation of a new corporation to take their place, subject to the existing obligations of the old companies. *Pullman Car Co. v. Mo. Pacific Co.*, 115 U. S. 587.

That one railroad company can not, in the absence of statutory authority, lease its road to another so as to absolve itself from its obligations to the public, is established by *Thomas v. Railroad Co.*, 101 U. S. 84, and *Railroad Co. v. Winans*, 17 How. 30. But the clear implication from these cases is that, with such authority, it may be done.

4. The nonliability of the defendant company after July 1, 1886, for an injury occurring on the line of road, which prior to said date had been incontestably its own, had been adjudicated in the Supreme Court of the District of Columbia. *Dye v. C. & O. R. Co.*, at Law, No. 27,694. While, therefore, the doctrine of *res judicata* does not apply to the case because the plaintiff is different, the principle of *stare decisis* does.

5. The court below was without jurisdiction of the cause, for the reason that the defendant was a foreign corporation, and before the institution of the suit, the courts of Virginia and West Virginia, having jurisdiction so to do, had placed its property in the hands of a receiver; and the person upon whom the alleged service of process was made was the agent of the receiver and not of the defendant.

In this District it is only "in actions against foreign cor-

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porations doing business in the District" that there is any jurisdiction to try cases against them, which, in the instance mentioned, is obtained "by service on the agent of such corporation or person conducting its business." No such agent was served, and, what is more important, there was none to be served. The defendant company was not conducting business anywhere. The premises from which jurisdiction is derived were wholly non-extant. The court was not competent to try the case at all. *Thompson on Corp.*, Sec. 7503; *Amy v. Watertown*, 130 U. S. 302; *Ambler v. Archer*, 1 App. D. C. 106; *Railroad Co. v. Telegraph Co.*, 112 U. S. 310; *Lathrop v. Railroad Co.*, 1 MacA. 238. The objection that the court below had no jurisdiction may be raised for the first time in the appellate court. *Cerro Gordo County v. Wright County*, 59 Iowa, 485; *Brondberg v. Babbett*, 14 Neb. 517; *Nazro v. Cragin*, 3 Dill. 475.

6. A receiver appointed by a State court could only be sued by leave of the court appointing him. The party upon whom process was served in the present case was in point of fact in the service of the receiver appointed by the decrees referred to—a party exempt from suit in this jurisdiction, without leave from the courts under whose decree he was acting. *Railroad Co. v. Jones*, 155 U. S. 350; *Barton v. Barbour*, 104 U. S. 128–131; *Porter v. Sabin*, 149 U. S. 479; 5 *Thomp. Corp.*, Sec. 7128; *High on Receivers*, Sec. 254; *Keen v. Breckenridge, Receiver*, 96 Ind. 69; *Cherry v. Railroad Co.*, 59 Ga. 446; *Metz v. Railroad Co.*, 58 N. Y. 66; *Railroad Co. v. Hoechner*, 67 Fed. Rep. 459.

A receiver can neither sue nor be sued without leave of the court appointing him. *Pike Co. v. State*, 34 N. E. 440; *Martin v. Atkinson*, 2 Idaho, 590; *Melendy v. Barbour*, 78 Va. 544; *Jordan v. Wells*, 3 Wood's C. C. 527; *High on Receivers*, Sec. 254; 3 *Wood's Rwy. Law*, 1656.

The receiver is not subject to the process of any other court than the one which appoints him. 2 *Redfield on Railways*, p. 424. "Where the property of a railroad com-

pany is in the hands of a receiver and its road operated by him, service of process upon the agent of the receiver will give no jurisdiction over the company." *Heath v. Railroad Co.*, 83 Mo. 618; 20 Am. & Eng. Encyc. 355.

7. Unless disabled by her coverture from so doing, Mrs. Howard has signed and sealed a full satisfaction and discharge of all her claims on account of the accident at Soldier, by whatever company it may have been caused. *Stockton v. Frey*, 4 Gill, 424; *Hager v. Thompson*, 1 Black, 80; *U. S. v. Childs*, 12 Wall. 245; *Hennessey v. Bacon*, 137 U. S. 85; *Clark v. Abbott*, 53 Minn. 90; *Bull v. Bull*, 43 Conn. 455; *Keyser v. Hite*, 133 U. S. 149.

8. The record shows another fatal error, which would necessarily cause an arrest of judgment upon motion. An amendment to the original declaration was made, changing it from an action upon contract to an action in tort. To the amended declaration was interposed the plea of the statute of limitations. An injured passenger may sue, in assumpsit upon the contract or in case upon the breach of the duty raised by the law. *Patterson on Accident Law*, 390, and authorities cited; *Railroad Co. v. Derby*, 14 How. 485. The statute of limitations will operate against an amended declaration which for the first time sets up a sufficient cause of action or sets up a new cause of action. *Moses v. Taylor*, 6 Mackey, 255; *Johnson v. District of Columbia*, 1 Mackey, 427; *Union Pac. Co. v. Weyler*, 158 U. S. 285.

In the following cases the declarations were almost identical with the original declaration in the case at bar, and they were held to be suits upon contract. *Railroad Co. v. Peoples*, 31 Ohio St. 537; *Bank v. Brown*, 3 Wend. 158. In the following cases the declarations were almost identical with the amended declaration, and they were held to be declarations in tort. *Ansell v. Waterhouse*, 6 M. & S. 385; *Bethlehem v. Wood*, 7 E. C. L. 602; *Bozzi v. Shipton*, 8 Ad. & El. 963. The amended declaration was therefore open to the bar of the statute of limitations. *Crofford v. Cothran*,

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2 Sneed (Tenn.), 492; *Palmer v. Express Co.*, 52 Ga. 240; *Weeks v. Railroad Co.*, 61 Cal. 149; Wood on Limitations, 623.

• Mr. Justice SHEPARD delivered the opinion of the Court:

The judgment appealed from can not be sustained upon the ground that the court below had no jurisdiction over the defendant, because it was a foreign corporation. The marshal's return of service upon C. H. Chapin, agent of the defendant in the District of Columbia, follows the statute providing for the service of process upon foreign corporations (R. S. D. C., Sec. 790), and makes a *prima facie* case of "doing business in the District" as well as of the agency of the party so served. The defendant's pleas raised the only points in respect of the jurisdiction of the court that could operate in a case like this, namely, that the court had not acquired jurisdiction of the foreign corporation because it was not doing business in the District of Columbia at the time of the service of the writ; and the party served as its agent therein was not such an agent as to give jurisdiction through that service. Having jurisdiction of the subject-matter of the suit, the court could unquestionably render a binding judgment against the defendant, though a foreign corporation, upon service had in compliance with the provisions of the statute and founded on the existence of the conditions therein prescribed, or upon its general appearance, by competent authority, to defend the action. *Goldney v. Morning News*, 156 U. S. 518.

Section 790, *supra*, was intended merely to remedy an existing mischief by providing a simple and effectual way through which a foreign corporation doing business in the District of Columbia might be brought "before the court" and compelled to answer. It does not undertake to limit the general jurisdiction of the courts of the District, and can not be construed as preventing their jurisdiction from attaching in any case where a foreign corporation might,

like a natural person resident elsewhere, appear by competent authority and answer the cause of action.

The remarks made in *Ambler v. Archer*, 1 App. D. C. 94, 106, in respect of the jurisdiction of causes of action against foreign corporations must be taken in application to the facts of that case. As stated in the opinion; that case "involved the question of the liability of a foreign corporation to be sued and called to account in the courts of this District for and in respect of all their corporate transactions occurring in other jurisdictions." *Id.*, p. 99. It has been generally held, and for reasons that are obvious, that no court will take jurisdiction to exercise visitatorial power over a foreign corporation, or to regulate its internal affairs. *Clark on Corp.* 639; *Taylor Corp.*, Sec. 392.

The defendant had the right to appear specially, as it did in the first instance, and controvert the jurisdiction; and none of its rights were thereby waived. *Goldey v. Morning News*, 156 U. S. 518, 525. Consequently, when its pleas were stricken out and judgment by default rendered, it could have appealed and tested the soundness of that ruling. But instead of adopting that course, it moved the court to set aside the default, and that motion was granted upon condition that it should plead the general issue. The acceptance of the condition worked an abandonment of the pleas attacking the jurisdiction and the validity of the service of the writ, and had the court erred in striking them out, the defendant would be estopped to question the soundness of the ruling. *Railroad Co. v. Brown*, 17 Wall. 445, 450.

Moreover, conceding the view of the operation of the statute aforesaid contended for by the appellee, the jurisdiction of the court was, nevertheless, complete. Defendant had for years maintained an office in the District, where, represented by a resident agent, it was engaged in business. Disregarding the lease made by the defendant to the Newport News and Mississippi Valley Company, which will be

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discussed later, that office and agency remained unchanged at the time of the appointment of the receiver by the courts of Virginia and West Virginia. The decrees of those courts could not operate a transfer of the property of the defendant in the District of Columbia, and the receiver appointed by them had no authority that must be respected here. *Booth v. Clark*, 17 How. 322; see also *Brigham v. Ludington*, 12 Blatch. 237, 242; *Day v. Postal Tel. Co.*, 66 Md. 354, 360; *T. & P. R. Co. v. Gay*, 86 Tex. 571, 597; *Filkins v. Nunne-macher*, 81 Wis. 91; *Farmers' and Merchants' Ins. Co. v. Needles*, 52 Mo. 17.

What has been said above must be confined to the point actually ruled, which is that the decree of the Virginia court had no effect as such within the District of Columbia, and could not itself operate a transfer of the property of the defendant situated therein. There may probably be cases in which the courts of the District would, upon application and for good cause, recognize the receiver appointed by the court of a State and permit him to become a party to litigation affecting the estate or fund or interests that might be under his management; but that question will not now be decided.

Notwithstanding, then, the appointment of the receiver, the defendant remained in existence as a corporation, not only here, but in the State of its creation also; and although it may have admitted the Virginia receiver into the occupation of its office in the District, it does not follow necessarily that it abandoned its property, ceased its corporate business entirely, discharged its former agent and left the District. The mere employment of the defendant's general agent by the receiver did not of itself operate his discharge from its representation. There is nothing irreconcilable in his service of both the defendant and the receiver; and there was nothing to prevent them from co-operating, if they saw proper, in the management of the business. *R. Co. v. Brown*, 17 Wall. 445, 450; *P. R. Co. v. Jones*, 155 U. S. 333, 350.

2. In respect of the plea of limitation, we are of the opin-

ion that the amended declaration, though filed more than three years after the accrual of the cause of action, did not open the case to that bar. The possession of a valid ticket over defendant's lines of railway entitled Laura P. Howard, as holder thereof, no matter from whom purchased, to all the rights of a passenger and charged the defendant with all the ordinary duties of a common carrier. *Sleeper v. Pa. R. Co.*, 100 Pa. St. 259. For the breach of the contract, or the failure of the duty assumed thereunder, the plaintiffs could declare in the form of *assumpsit* or in tort. We do not think it necessary to follow counsel in their critical examination of the precise nature of the form of the action as disclosed by the terms of the original and amended declarations, both of which are fairly set out in the statement of the case. It is sufficient to say that the original is in *assumpsit*, and that the amendment seems not to depart substantially from it. The rule in respect of amendments that prevails in our practice is both liberal and just. *Magruder v. Bell*, 7 App. D. C. 303, 312; *Morris v. Wheat*, ante, p. 201. And when an amendment shall have been made, the question whether the action has been thereby opened to the bar of limitations depends upon matter of substance. *Morris v. Wheat*, supra. Whether the cause of action remains the same should be the test, and the mere change from the form of action in *assumpsit* to one in tort would be immaterial. *Smith v. Bellows*, 77 Pa. St. 441.

3. Another contention in support of the judgment is that the release under seal executed by Laura P. Howard to the Newport News and Mississippi Valley Co. was a complete bar to the action, and of itself required an instruction to the jury to find for the defendant. The ground is that under the statute defining the separate property of married women and their right of contracting and suing in respect thereof without joining the husband (R. S. D. C., Sec. 727), the right of action in this case became the separate property of the wife, and could be discharged by her separate

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act. No instruction was asked by either party in respect of this point, and it seems to have been completely ignored. It may be here remarked that even in the view of the wife's right contended for by the defendant, the husband had an independent right to recover such special damages as he may have sustained by reason of the injury to his wife. *Metropolitan Railroad Co. v. Snashall*, 8 App. D. C. 435. It is not necessary to consider whether this right of property in a cause of action for personal injury accruing in another State must be determined by the law of the forum, of the domicile of the injured party, or of the place of the contract and injury. There being no proof of the laws of Kentucky or Indiana as regards the property rights of married women, the presumption must be indulged either that the rule of the common law or that in force in the District of Columbia prevails in both those States. If it be the rule of the common law, clearly the wife could not release the claim for damages. If it be the rule prevailing in the District, we are constrained to adopt the same conclusion. It seems to have been the general opinion of the profession that the statute did not embrace a right of action for personal injuries, and hence it was the universal rule, so far as we can now learn, to bring such suits, after the date of the act as before, in the names of both husband and wife. The question at last came before the Supreme Court of the District, in general term, in 1890, and after full consideration it was held that such a right of action was not the separate statutory property of the wife. *Snashall v. Metropolitan Railroad Co.*, 19 D. C. 407, 411. The soundness of that decision seems not to have been questioned until the argument of this case. It has become a rule of property to as great an extent as is possible in respect of property of such peculiar character, and whilst not altogether satisfied with the reasoning by which the conclusion was reached, we think it proper to follow it in a case coming directly within it. What the rights of the wife might be under certain circum-

stances, as against the husband, will not now be inquired of; but may be regarded as open for consideration when a proper case may be presented. Nor is it material to inquire whether, under the allegations of the declaration, the husband is not estopped to deny that the claim in suit is the separate property of the wife through his gift of the same to her; for if the right was not her separate property under the statute, she could not make a contract effective, at least, at law, without his joining with her. *Rathbone v. Hamilton*, 4 App. D. C. 475, 485, 488.

4. The decision of these preliminary questions against the contention of the appellee brings us to the consideration of the points upon which the case was actually made to turn by the learned justice who presided at the trial and directed the verdict.

(1) We are of the opinion that the evidence of H. W. Fuller respecting the contents of the ticket was rightly admitted. It is true that the absence of the ticket itself was not directly accounted for, but no objection was made on that ground. The witness was general passenger agent at the time the ticket was printed, and, whilst he had not seen that particular ticket, he was able to testify to its contents from his recollection of the forms of ticket then in use, all of which had been prepared under his direction. The person who sold the unused part of the ticket to Mrs. Howard produced a memorandum entry of the sale showing that the ticket was of a printed form designated as 758c. The witness Fuller produced a single trip ticket from Washington to Louisville, of that form, and then testified that the "round trip" tickets had the same designation, but with the additional term "ex.," signifying excursion or round trip, and that their conditions were identical in all respects save one relating exclusively to the use of the return coupon. That condition has no bearing whatever upon the case. In this state of the evidence it was not improper to permit the witness to refer to the single trip ticket in order to refresh his memory of the

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precise words printed on the excursion ticket which, with its return coupon only, Mrs. Howard had purchased and used.

(2) The ticket upon its face declared that the defendant, in selling it, assumed no responsibility beyond its own line, and acted as agent only for connecting lines. In the absence of a special contract to the contrary, the selling carrier's duty is completely discharged by safe carriage to the end of its own line where a connecting carrier may be ready to continue the transportation on the designated route. *P. R. Co. v. Jones*, 155 U. S. 333, 339. And in so far as the duty of the defendant is to be controlled by the terms of the contract in this case, it remained unchanged. The original purchaser was bound by these conditions, and plaintiff, holding under him, could have no better right. Therefore, if the testimony shows that the defendant and the corporation which owned the line between Lexington and Big Sandy were engaged in the operation of their own lines respectively, without partnership or agreement for joint operation beyond that of receiving and forwarding passengers upon such tickets, with separate coupons for each line, the defendant incurred no liability to the plaintiff, and the instruction to the jury would have to be sustained. *P. R. Co. v. Jones*, 155 U. S. 333.

(3) From that testimony, given exclusively by defendant's witnesses and set out in full in the preliminary statement, it appears that the road upon which the accident occurred had been built by the Elizabethtown, Lexington and Big Sandy Railroad Company under a charter from the State of Kentucky, and is wholly within that State. That charter authorized it to make contracts with other corporations for the operation of its railway. The Chesapeake and Ohio Railway Company, under charter from the State of Virginia, built and operated a railway from Newport News to Huntington and Big Sandy, connecting with the line of the Elizabethtown, Lexington and Big Sandy Railway Company. Collis P. Hunt-

ington, who was the principal stockholder and the controlling spirit of each corporation, conceived a plan to bring under one management the foregoing railway lines and others into one great line of transportation from the Atlantic to the Pacific. Beginning in 1882, trains were run over the two lines aforesaid by the name of the Chesapeake & Ohio route, "under an arrangement by which it was practically a continuous system." "The properties were then operated together by one general manager, Mr. C. W. Smith, under the verbal directions of Mr. C. P. Huntington." The terms of this "arrangement" are not given; but it appears that the defendant's officers maintained the railway of the Kentucky corporation and kept an account of all receipts and disbursements on account of the latter. From the terms of the "arrangement" as stated, and the nature of the proceedings thereunder, we think it clear that the defendant became responsible for the safe carriage of passengers over the railway of the Kentucky corporation. *P. R. Co. v. Jones*, 155 U. S. 333; *Sun Ins. Co. v. Kountz Line*, 122 U. S. 583. The condition of a contract, therefore, confining defendant's liability to its own line must necessarily be limited in its operation to such other connecting lines only as may have remained under their own separate and independent management. This "arrangement" or contract for the operation of one line by the other was to extend to the latter part of the year 1887, or about one year later than the date of the injury to Mrs. Howard. It follows, therefore, that if nothing had occurred in the meantime to change the arrangement aforesaid, the condition of the ticket would not prevent recovery in this action if the injuries received by Mrs. Howard were caused by the carrier's negligence.

(4) The chief point of defendant's contention is that the arrangement had come to an end prior to the accident, in so far as defendant was concerned, by the lease of its line to the Newport News and Mississippi Valley Company. The evidence in support of this contention shows that in

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January and June, 1886, respectively, the defendant and the Elizabethtown, Lexington and Big Sandy Railway Company had entered into contracts with the Newport News and Mississippi Valley Company for the lease of their lines for 250 years, upon an annual rental of \$5,000. Collis P. Huntington signed the defendant's lease for each company as president. Though not president of the Kentucky corporation, he controlled it absolutely. This was all done in execution of his plan for a great Atlantic and Pacific railway system. Referring to the arrangement aforesaid, under which the defendant operated the two lines of railway, the witness said: "The organization of the Newport News and Mississippi Valley Company terminated the contract, I suppose, by force of the arrangement then made. It was terminated in the same manner it was made by direction of Mr. Huntington; Mr. Huntington directed Mr. Smith to operate the properties, as I have indicated, and upon the formation of the Newport News and Mississippi Valley Company and the execution of the leases, he directed the operation of the line to be had in accordance with these leases." This general lessee corporation was incorporated by the Legislature of the State of Connecticut, March 27, 1884, under the name of the Southern Pacific Company, which was changed by an amendatory act, March 10, 1885, to that of the Newport News and Mississippi Valley Company. This act of incorporation is not set out in the record, and it does not appear what express powers it was authorized to exercise outside the limits of that State. One clause is given, however, which expressly forbids the power to "make joint stock with, own, hold or operate any railroad in the State of Connecticut."

Virtually banished from the State of its creation, this corporation came to the State of Virginia, and apparently without permission of the legislature of that State, leased and undertook to operate the railway and exercise the franchises of the defendant. It is unnecessary to cite authorities to the

point that the defendant, a *quasi*-public corporation of the State of Virginia could not, without the express consent of that commonwealth, escape the performance of its duties and obligations by a voluntary surrender of its road to a so-called lessee. Whilst the lessee might become liable for an injury done in the operation of the railway, the lessor would not be exempt by reason of its retirement therefrom. Two things must concur to give full legal operation to a lease by one such corporation to another, namely, the permission of the State through power expressly conferred upon each. *St. Louis, etc., R. Co. v. T. H. & I. R. Co.*, 145 U.S. 393, 402. There is nothing in the record to show that the State of Virginia ever authorized the lease by defendant of its railway. Nor does it appear that the existence of the Newport News and Mississippi Valley Company had ever been recognized by that State, or the State of Kentucky, much less the power conferred upon it to lease and operate a railway therein. If it had been proved that the defendant had the general power to lease its road that seems to have been conferred upon the Elizabethtown, Lexington and Big Sandy Railway Company, and that the Newport News and Mississippi Valley Company had the general power under its charter to lease and operate railways anywhere outside of the limits of Connecticut, we could not regard this lease as exempting the defendant from liability. Notwithstanding the independent existence of our States, their mutual relations and interests and the general welfare of the Union demand that in respect of the recognition of the legislative and judicial acts of one by the others, the widest and most liberal principles of comity should prevail. There is no proper room for the exercise of a selfish or jealous spirit. But the limit is reached when one seeks to act in respect of matters peculiarly within the power of another, or in opposition to its fixed policy. Consequently, by operation of the spirit of comity, the *bona fide* corporations of one State have been permitted to enter the others, to maintain offices, to

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transact business and to maintain their rights in the courts where their business and objects have not been immoral or opposed to sound and well-defined public policy. But comity has never been stretched so far by any State as to permit the corporation of another State to exercise an extraordinary power or franchise within its boundaries, without its own express grant. And for the same reason, the courts of a State will not recognize a contract by which a foreign corporation, without express sanction of their own legislature, takes upon itself the performance of duties and powers of a public nature which have been conferred upon corporations created by the State itself for those purposes. Moreover, there is another well founded limitation upon the exercise of comity in such cases. A foreign corporation should not be recognized or tolerated in the exercise of extraordinary powers or in carrying on business that are expressly forbidden it in the State of its creation. This general doctrine has been enounced in a well considered case by the Supreme Court of Kansas that commands our approval. *Land Grant Ry. & T. Co. v. Board Coms. Coffee Co.*, 6 Kans. 245; see also 6 Thomp. Corp., Sec. 7896; 2 Morawetz Corp., Sec. 965a; Wharton, Conf. Laws, Sec. 390b. Though not fully stated in the record, the charter of the lessee company shows enough to bring it within exception to the rule of comity above stated. Discredited by its own creating legislature, specially forbidden the exercise of these very powers in its own State, and practically expelled therefrom, are other States, in the language of the Supreme Court of Kansas, "bound by any kind of courtesy or comity, or friendship or kindness, to treat this corporation better than its own creator has done?" We think not. Had this corporation been recognized in the exercise of these powers by the Court of Appeals of Virginia, we would feel bound to follow its decision and give effect to the lease within the limits of that State; but in the absence of such a decision we will give effect to our own opinion. That the proba-

bility of such a decision by the courts of the States directly interested was apprehended by the controller of these corporations, is apparent from the evidence of the witness heretofore freely quoted from, who had been the general solicitor in Virginia for both the lessor and lessee. He says: "The Newport News and Mississippi Valley Company had organized and taken a number of leases from the foregoing companies when a question arose as to the provisions of the original act, which provided that the Newport News and Mississippi Valley Company should not have the power 'to make joint stock with, own, hold or operate any railroad in the State of Connecticut.' The amendment of April 27, 1887, added these words: 'Unless such railroad shall be held, owned or operated within said State in conformity with the provisions of the general laws of the State.'" It is not necessary to consider the effect of this amendment, because it took effect long after the accrual of plaintiff's cause of action. The same apprehension, we may add, seems to have inspired the terms of the release obtained from Mrs. Howard, which discharged not only the said lessee by name, but also its "lessors or predecessor companies."

5. Having occupied so much space with a statement of the evidence upon which the case was submitted in order that it might be fully and fairly presented, and having dwelt at some length upon the questions that required consideration and decision, we will pretermit, as unimportant as well as unnecessary, in view of the foregoing conclusions, the consideration of the general question of liability irrespective of the invalidity of the lease.

Being of the opinion, for the reasons above given, that it was error to direct a verdict for the defendant, the judgment will be reversed, with costs to the appellants, and the cause remanded with direction to set aside the verdict and grant a new trial. It is so ordered.

*Reversed and remanded.*

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JAVINS v. UNITED STATES.

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## CRIMINAL LAW ; GAME LAWS ; EVIDENCE.

The possession by a person in the District of a partridge or quail during the close season prescribed by the act of Congress of June 15, 1878 (20 Stat. 134), is a violation of that act, whether such bird was taken or killed beyond the limits of the District or not.

No. 707. Submitted October 5, 1897. Decided November 1, 1897.

HEARING on an appeal by a defendant indicted and convicted of violating the game laws. *Affirmed.*

The facts are sufficiently stated in the opinion.

*Mr. Arthur A. Birney* for the appellant.

*Mr. Henry E. Davis*, U. S. Attorney for the District of Columbia, and *Mr. D. W. Baker*, Assistant Attorney, for the United States.

Mr. Chief Justice ALVEY delivered the opinion of the Court :

The appellants in this case were indicted as Charles H. Javins, John F. Javins and Frank H. Javins, otherwise called Francis H. Javins, all of the District of Columbia, for that, *on the 16th day of March, 1897*, they had *in their possession*, and exposed to sale, six dead partridges, otherwise called quails, against the form of the statute, etc.

The presentment or indictment was found under section 1 of the act of Congress of June 15, 1878, chapter 213, entitled "An act for the preservation of game and protection of birds in the District of Columbia." The appellants pleaded the general issue of not guilty, and upon the evidence and under the instruction of the court, the jury found the appellants guilty, and the court thereupon imposed the

penalty prescribed by the statute. It is from that judgment that this appeal is taken.

Section 1 of the act under which the indictment was found provides, "that no person shall kill or expose for sale, or *have in either his or her possession, either dead or alive*, any partridge, otherwise quail, between the 1st day of February and the 1st day of November, under a penalty of five dollars for each bird so killed or *in possession*."

The Government proved that the appellants, as partners and dealers in game and fish at the Center Market, in the city of Washington, had, on March 16, 1897, in their possession, at their place of business, and exposed for sale, one partridge, otherwise quail; and thereupon rested its case. The appellants then gave evidence to prove that the partridges, otherwise quails, were shipped to them with other quails *in regular course of trade* from Illinois or Missouri, a few days prior to the 16th day of March, 1897, and were not killed in the District of Columbia; and the appellants thereupon rested their case. And no other evidence being offered by either side, the appellants severally prayed the court to instruct the jury—

First—"That if the birds found in the possession of the defendants were not killed, entrapped or taken in the District of Columbia, then they should render a verdict for the defendants;

Second—"That if the bird offered for sale, or found in the possession of the defendants, was not killed, entrapped or taken in the District of Columbia, but was shipped to the defendants from without said District, they should render a verdict for the defendants;

Third—"That unless the jury should find beyond a reasonable doubt that the birds in question were killed in the District of Columbia, the defendants should be acquitted."

The court refused these prayers for instruction, and directed the jury that the evidence offered by the defendants was immaterial, and constituted no defence to the indict

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ment. To which ruling the appellants excepted; and the verdict and judgment being against them, they have appealed.

It being conceded that the birds were taken or killed beyond the limits of this District, the question is, whether the parties having them in possession in this District for sale, have incurred the penalty prescribed by the statute?

The fact that the birds were taken or killed in one of the States of the Union and brought into this District for sale, in the regular course of trade, does not furnish the possessors of such game birds immunity from the penalty prescribed by the statute, upon any principle of interstate commerce involved. *Geer v. Connecticut*, 161 U. S. 519. Congress, under the Constitution, possessing plenary legislative power over this District, may pass laws for the full and complete protection and preservation of all game birds or other animals *feræ naturæ* therein; and whatever may be the natural right of man in such wild creatures when captured and reduced to possession, such right may be restrained by positive laws enacted for reasons of state or for the supposed benefit of the community. 2 Bl. Com. 410; *Geer v. Connecticut*, *supra*. All civilized nations, from the earliest time, have enacted and enforced game laws, for the protection of game in which there was a common right against wasteful and indiscriminate destruction. Laws of this character, of more or less strictness, are found upon the statute books of England, and of most, if not all, of the States of this Union; and at no time has there been greater need of such laws, and their enforcement, than at the present time; for it is a known fact that our game and insectivorous birds are being rapidly exterminated. In order to prevent evasion of the law, and as a certain means of accomplishing the desired end, many of the game laws make it a substantive offence for a party, within the time and territory prescribed, to have in his possession, either dead or alive, any of the birds or animals sought to be protected. Otherwise the difficulty of

proving the time and place of taking or killing such game would effectually defeat the operation of the law. Indeed, in a small territory, such as this District, it would be impossible to protect the birds, if they could be killed or taken on the exterior border to be brought into the District. The only effectual way of dealing with the subject is to prohibit the possession of the birds within the District, and that is entirely within the power of Congress.

In this case the whole question is one of construction. The terms of the statute are clear and unambiguous. The killing, or offering for sale, of any of the birds specified is prohibited; and also the having in possession, either dead or alive, any partridge, otherwise quail, within this District between the 1st of February and the 1st of November, renders the party liable to a penalty of five dollars. The contention is, that this provision of the statute does not apply to birds killed or taken beyond the limits of the District of Columbia. But to this contention we can not assent.

This same contention has been urged in many of the States whose game laws are similar to the one under consideration; and while in some few States the construction would seem to be variant, and give sanction to the contention urged, the decided preponderance of judicial opinion is against such contention. And this would seem to be supported both upon reason and sound policy. Indeed, the act of Congress under consideration would seem to furnish the key to its own proper construction, if such were needed, by the provision of the fourteenth section, which declares: "That persons in killing birds for *scientific purposes* or in *possession of them for breeding*, shall be exempt from the operation of this act, by *proving affirmatively such purposes*; and the possession shall, in all cases, be *presumptive evidence of unlawful purpose*." This exceptional purpose, therefore, is in all cases to be proved by the defendant; and in the absence of such affirmative proof, the presumption is *conclusive* of the unlawful purpose of the possession.

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As showing the interpretation of statutes similar to that under consideration, by State courts, we shall refer to a few of those decisions, and which are referred to in *Geer v. Connecticut*, *supra*, with apparent approval.

The first of such decisions to which we shall refer is *Phelps v. Racey*, 60 N. Y. 10, where the statute declared that no person should expose for sale, or kill, or *have in his possession* after it had been killed, any quail or other game, between the 1st of January and the 20th of October. The defendant was indicted for having quail in his possession in March. He had invented an apparatus to preserve game, and that which he had in his possession, and specified in the indictment, according to his proof, was killed in New York in the open season, or received from Minnesota, or Illinois, where the killing at the time was legal, and put up by him in his apparatus in the month of December. This, to say the least of it, was a questionable defence, and such as to justify, upon principles of policy, the entire exclusion of it. It was contended that the statute did not apply to game so received and preserved. But it was held otherwise by the Court of Appeals; and in an opinion of the court, delivered by Church, Chief Justice, it was said: "The language of these sections is plain and unambiguous; hence there is no room for construction. It is a familiar rule that when the language is clear, courts have no discretion but to adopt the meaning which it imports. The mandate is, that 'any person having in his or her possession' between certain dates, certain specified game killed, shall be liable to a penalty. The time when, or the place where, the game was killed, or when brought within the State, or where from, is not made material by the statute, and we have no power to make it so. . . . That it was either killed within the lawful period, or brought from another State where the killing was lawful, constitutes no defence. The penalty is denounced against the selling or possession after that time, irrespective of the time or place of killing."

The same principle was applied in the construction of the game law of the State of Illinois of 1879, which made it unlawful to sell; or have in possession, quail and certain other game birds, during the close season, and which was not in terms limited to birds taken within the State. In the case of *Magner v. People*, 97 Ill. 323, Scholfield, J., in delivering the opinion of the court, said: "We think it is obvious that the prohibition of all possession and sales of such wild fowls or birds during the prohibited seasons would tend to their protection, in excluding the opportunity for the evasion of such law by clandestinely taking them, when secretly killed or captured here, beyond the State, and afterward bringing them into the State for sale, or by other subterfuges and evasions. It is quite true that the mere act of allowing a quail netted in Kansas to be sold here does not injure, or in any wise affect the game here, but a law which renders all sales and all possessions unlawful will more certainly prevent any possession or any sale of the game within the State than will a law allowing possession or sale here of the game taken in other States. This is but one among many instances to be found in the law where acts, which in and of themselves alone are harmless enough, are condemned because of the facility they otherwise afford for a cover or disguise for the doing of that which is harmful." The same principle and reasoning were adopted and followed in the subsequent case of the *American Express Co. v. People*, 133 Ill. 649, arising under the amended game law of Illinois of 1889.

Similar constructions of game laws of like import have been adopted in Ohio in the case of *Roth v. State*, 51 Ohio St. 209, and in Missouri in the cases of *State v. Randolph*, 1 Mo. App. 15, and *State v. Farrell*, 93 Mo. 176. And in the State of California, in a full and well reasoned opinion by the Supreme Court of that State, in the case of *Ex parte Maier*, 103 Cal. 476, the same construction was fully adopted. In that case it was held that the State, in the exercise of the

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police power, could prohibit the taking of wild game and any traffic or commerce therein, if deemed necessary for its protection or preservation, or the public good, and to this end could make it criminal for any person to sell, or offer for sale, any of such game, whether killed within or without the State.

It is true, there are several States in which a different construction would seem to prevail, though made of statutes somewhat different in terms from the statute here involved. This appears in *Com. v. Hall*, 128 Mass. 410; *Com. v. Wilkinson*, 139 Pa. St. 304; *State v. McGuire*, 24 Oregon, 366; *Dickhaut v. State* (Md.), 37 Atl. Rep. 21. These cases, however, do not appear to be supported by such weight of argument as to countervail and require to be disregarded the cases holding a contrary doctrine.

In this case, as we have said, the words of the statute are plain and unambiguous, and that being so, Congress must be intended to mean what the language employed plainly expresses, and consequently there is no room for construction. The court is not at liberty to read into the statute an exception to the general and unqualified provision, there being no such exception expressed, and where, indeed, by clear implication, such exception is excluded.

This question of the unqualified application of the terms of a game law to game killed beyond the limits of the country enacting the law and brought within the country, arose in the courts of England, and was decided in the case of *Whitehead v. Smithers*, 2 Com. Pl. Div. 553. In that case the question was raised upon two acts of Parliament passed for the protection of wild fowl, viz., 35 and 36 Vict., C. 78, and 39 and 40 Vict., C. 29. By Section 2 of the first-mentioned act, it was enacted that any person who should kill or take any wild bird, or expose or offer for sale any wild bird recently killed or taken between the 15th of March and the 1st of August, should incur a penalty of 5s., "unless he should prove to the satisfaction of the justice that the

bird was bought or received on or before the 15th of March, or of or from some person residing out of the United Kingdom." Under that statute it was an answer to an information if the person charged could prove that the bird which he exposed or offered for sale was bought or received by him of or from some person residing out of the United Kingdom. But that act failed to accomplish the purpose of the legislature, and deeming it necessary to pass a more stringent and less qualified act, the act of 39 and 40 Vict. was passed; and after reciting that the protection accorded by the preceding act of 1872 was found to be insufficient, the last act enacted "that any person who shall kill or take, or *shall have in his control or possession*, any wild fowl recently killed or taken, between the 15th of February and the 10th of July, shall, on conviction, forfeit and pay for every such wild fowl so killed, etc., or *so in his possession*, not exceeding £1." In that case it was urged that, inasmuch as the second act did not in terms repeal the first act, and the second act made no mention of wild fowl killed or transported from beyond the limits of the United Kingdom, the two acts should be read together, and consequently, it having been proved that the plover in question was bought by the defendant of a person residing in Holland, that was an answer to an information under the latter act. But the court held otherwise, and, in the opinion delivered by Lord Chief Justice Coleridge, he said: "It is said that it would be a strong thing for the legislature of the United Kingdom to interfere with the right of foreigners to kill foreign birds. But it may well be that the true and only mode of protecting British wild fowl from indiscriminate slaughter, as well as of protecting other British interest, is by interfering indirectly with the proceedings of foreign persons. The object is to prevent British wild fowl from being improperly killed and sold under pretence of their being imported from abroad. It has been said that the second statute can not be held to operate as a repeal of the first, because there is

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no contrariety or repugnancy in the two acts. The act of 1876, however, refers in terms to the act of 1872, and declares that the protection afforded by it to the wild birds was insufficient, and that it is expedient to provide further for their protection." And this was done, as we have seen, by omitting from the last act the exception contained in the first, allowing birds to be brought into the Kingdom from foreign parts, and prohibiting their possession in the Kingdom during the prescribed period. This was found in England to be the only effectual mode of protecting the birds within the Kingdom; and that mode has been adopted by the act of Congress which we have considered.

It follows that the judgment of the court below must be affirmed. And it is so ordered.

*Judgment affirmed.*

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CARVER v. O'NEAL.

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CONSTITUTIONAL LAW; JUSTICES OF THE PEACE; PLEADING AND PRACTICE; BILL OF PARTICULARS; JOINDER OF ISSUE; CERTIORARI.

1. The act of Congress of February 19, 1895 (28 Stat. 668), enlarging the jurisdiction of justices of the peace in this District, is constitutional; *following* *Railway Co. v. O'Neal*, 10 App. D. C. 205.
  2. The statements contained in the return made to a writ of *certiorari* must, on an appeal from an order quashing the writ, be taken to be true, when in conflict with the statements of the petition for the writ.
  3. Where a complaint before a justice of the peace sufficiently informs the defendants what the cause of action is, and it does not appear that a refusal of the justice to require of the plaintiff a bill of particulars in any manner injured or hindered the defendants, such refusal will not be held to be error.
  4. A failure to join issue is cured by verdict and judgment.
  5. *Quere*, whether irregularities in a trial before a justice of the
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peace, such as a failure by the justice to require a bill of particulars, or by one of the parties to file a joinder of issue, can be inquired into by *certiorari*.

No. 709. Submitted October 5, 1897. Decided November 1, 1897.

HEARING on an appeal by the petitioner from an order quashing a writ of *certiorari* to a justice of the peace. *Affirmed.*

The COURT in its opinion stated the case as follows :

This is an appeal from an order of the Supreme Court of the District of Columbia, quashing a writ of *certiorari* issued from that court to a justice of the peace to procure the vacating of a judgment which he had entered pursuant to the verdict of a jury.

Suit was instituted before Charles F. Scott, a justice of the peace, by the appellee, John C. Hennings, to recover damages to the amount of three hundred dollars for alleged personal injuries claimed to have been sustained by him through the negligence of the appellants. The injuries were stated to have occurred in the course of the construction of a building belonging to the appellant, the Capital Traction Company, in consequence of a defective scaffold, the other appellant, Frank N. Carver, being the contractor for the construction of the building. On the day specified in the summons served upon them, both of the appellants, who were jointly made defendants in the suit, appeared before the justice, and procured the removal of the cause, in accordance with the provisions of the statute authorizing such removal, to another justice, who was Lewis I. O'Neal, the appellee.

It is alleged by the appellants that on the removal of the cause to O'Neal, they requested that justice to require the plaintiff in the cause to render to them a bill of particulars, and that he refused the request. They also say that thereupon the plaintiff requested a trial by jury, and that the justice, before any issue joined between the parties, caused

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a writ of *venite* to be issued for the summoning of a jury. The cause was continued for eight days. In the meantime writs of subpoena for the attendance of witnesses were issued at the instance, of both parties; and on the day assigned for the trial, both parties appeared by counsel, announced themselves ready, and the jury being sworn, proceeded to examine and cross-examine witnesses.

The question was raised at the trial, whether the Traction Company was liable, inasmuch as it was claimed that the other defendant, Carver, was an independent contractor, and that he only, if any one, was liable. It appears that there was testimony on both sides of the question.

Instructions to the jury were requested by both parties; but it is not agreed between them what instructions were actually given. The appellants allege, in their petition subsequently filed for the writ of *certiorari*, that the justice "stated to the jury that the subject was so complicated and involved such intricate propositions of law that he would not instruct them at all upon that branch of the case, but would submit the question of law to the jury to decide," and that the appellants objected or excepted to this course. But the justice in his return to the writ states "that being of the opinion that the authorities read by Mr. Birney (who was attorney for the plaintiff) were binding and covered the case, he told the jury that the law was as stated by the Supreme Court of the United States in the case they heard read by Mr. Birney, and that he would submit the facts to them without further instruction." And he adds that he did not state to the jury that he would submit the law to them, and that he did not do so.

The jury rendered a verdict for the plaintiff for the sum of \$200 and costs, upon which the justice entered judgment.

Before the issue of any execution upon the judgment, the defendants in the cause filed their petition in the Supreme Court of the District of Columbia, for a writ of *certiorari* to require the justice to vacate the judgment, on account of the

alleged irregularities that had occurred in the cause, and on account of the alleged unconstitutionality of the statute of February 19, 1895, under which he had proceeded in the cause. The justice of the peace made return to the writ. And from the petition and return the facts here stated appear. •

Upon motion, the writ was quashed; and from the order quashing it the present appeal has been prosecuted by the petitioners.

*Mr. M. J. Colbert* for the appellants.

*Mr. Arthur A. Birney* for the appellee.

Mr. Justice MORRIS delivered the opinion of the Court:

As already intimated, the grounds on which it is sought to sustain the writ are two: 1st. The alleged unconstitutionality of the Act of Congress of February 19, 1895 (28 Stat. 668), whereby the jurisdiction of justices of the peace was sought to be enlarged and regulated; and, 2d. The alleged irregularities that occurred in the proceedings before the justice of the peace.

1. With reference to the first ground, it is conceded by the appellants that, so far as this court is concerned, the question is no longer an open one and is concluded by the decision in the case of *The Brightwood Railway Company v. O'Neal*, 10 App. D. C. 205. They admit that they raise it only to preserve their rights in the event that the Supreme Court of the United States should be of a different opinion upon the question. In view of our decision in the case cited, we must regard this ground as untenable.

2. The second ground we must regard as equally untenable. So far as the statements contained in the petition of the appellants, respecting the alleged irregularities complained of by them, are in conflict with the statements in the return made by the justice of the peace, the latter, for the purpose of the present hearing, must necessarily be ac-

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cepted as true. This return denies, as a matter of fact, the occurrence of any such irregularities, possibly excepting two, the refusal of the justice to direct the plaintiff to render a bill of particulars, and the fact that there was no joinder of issue before the empanneling of the jury. But it is not made apparent that there was any error of the justice in either of these two regards. A bill of particulars before a justice of the peace is somewhat unusual; and while it is proper that it should be demanded and rendered whenever the defendant is not sufficiently informed by the complaint what the cause of action is to which he is required to respond, yet it appears in the present case that the complaint was sufficiently definite (*Garfield v. Paris*, 96 U. S. 557); and it does not appear, and it is not even alleged, that the defendants in the cause were in any manner injured or hindered in their defence by the ruling of the justice or by the absence of a more specific bill of particulars. Nor is the alleged failure of the parties to join issue before the summoning of the jury a good ground for interfering with the judgment rendered. There are no formal pleadings before a justice of the peace. When parties appear and announce themselves for trial, and a trial actually supervenes with verdict and judgment, such announcement must be regarded as the equivalent of a joinder of issue. Even in the courts of general jurisdiction, where there are regular pleadings, and where a joinder of issue is a technical necessity, the irregularity of its omission is cured by verdict and judgment. *Laber v. Cooper*, 7 Wall. 565.

Finding in the record no such irregularities as are alleged by the appellants, we deem it unnecessary to enter into a discussion of the question, whether such irregularities, if they were shown to exist, could properly be inquired into by means of the writ of *certiorari*. We need not, therefore, consider here the very learned and elaborate opinion of Mr. Justice Cox, in the case of *Adriaans v. Johnson*, 24 Wash. Law Rep. 581, cited by the appellants, wherein, at the special

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term of the Supreme Court of the District, he discussed at considerable length the question of the functions of the writ in this District as addressed to justices of the peace for the purpose of reviewing and correcting errors committed by them. It is proper, however, to remark that the opinion in question was rendered by Mr. Justice Cox before the vexed question of the jurisdiction of the justices of the peace was brought forward in the cases already cited of *The Brightwood Railway Company v. O'Neal* and *Hof v. The Capital Traction Company*. See, also, *Clark v. Hendley*, 8 App. D. C. 165.

Being of the opinion that the order of the court below quashing the writ of *certiorari* in the case was right, we must affirm that order, with costs. And it is so ordered.

The CHIEF JUSTICE concurs in the conclusion here reached, while adhering to his opinion in the cases of *The Brightwood Railway Company v. O'Neal* and *Hof v. The Capital Traction Company*.

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SEITZ v. SEITZ.

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DEEDS, CONSTRUCTION OF; JOINT TENANCY AND TENANCY IN COMMON; EVIDENCE; LATENT AMBIGUITY.

1. While in construing a deed the construction is favored which makes a tenancy in common rather than a joint tenancy, it is a rule of the common law in force in this District that a conveyance of land to two or more persons without any sufficient indication of intention in the instrument that the grantees are to hold in severalty, is to be construed as creating a joint tenancy and not a tenancy in common, whatever may have been the intention of the parties in that regard.
2. In construing such a deed its terms can not in the absence of latent ambiguity be varied or explained by oral evidence.
3. Where a recital in such a deed (which conveys to a brother of the grantor and the wife of another brother an undivided two-thirds interest, the grantor retaining a one-third interest) is to

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the effect that the purchase money had been paid jointly by the several parties, such recital will not convert the tenancy created from a joint tenancy to a tenancy in common.

4. When the *habendum* and *tenendum* clause in such a deed provides that the grantees shall hold the property "to their *sole* use, benefit and behoof forever," the term *sole* is not equivalent to *several*, but to *only* or *exclusive*, and therefore by its use in such connection a tenancy in common is not created.
5. The fact that the original joint interest recited in such a deed to have been in the grantor, was severed, as to the grantor on the one hand and the grantees on the other, by the execution of the deed, does not justify a construction of the instrument as a tenancy in common. There is no inconsistency, legal or equitable, in the severance of his interest by the grantor and the continuance of the other in joint tenancy.

No. 680. Submitted October 7, 1897. Decided November 1, 1897.

HEARING on an appeal by the defendants from a decree in favor of the complainants in a suit for the construction of a deed and for a partition of certain real estate. *Reversed.*

The COURT in its opinion stated the case as follows:

The question in this case is whether a certain deed of conveyance therein set forth is to be construed as creating a joint tenancy or a tenancy in common between certain grantees therein named.

From the record it appears that, prior to the year 1877, the property mentioned in the cause, which is part of lot one (1), in square 343, in the city of Washington, then belonging to one George Seitz, ancestor of the parties to the cause bearing the name of Seitz, became involved in litigation in consequence of the efforts of the creditors of George Seitz to subject it to the satisfaction of certain judgments which they had procured against him. The result of the litigation was a sale of the property under a decree in equity. At this sale, in pursuance apparently of some family arrangement, the property was purchased, on October 23, 1877, by Joseph Franklin Seitz, a son of George Seitz, acting, as it appears from the record, under the direction of an elder brother, John F. Seitz, who was then, and for

several years previously had been associated with his father, George Seitz, under the firm name of George Seitz and Son, in the conduct of a bakery upon the premises. The purchase money was the sum of \$4,600, of which the sum of \$1,561.71 was paid in cash, and the residue, amounting to \$3,029.39, was secured by deed of trust upon the premises. But the deed of conveyance by the trustee who made the sale to Joseph Franklin Seitz was not executed until September 24, 1878, the delay apparently having been occasioned by the efforts of John F. Seitz to effect a settlement of some other judgments against his father, which he finally accomplished, and for which the money required (\$994.84) was in some way raised and secured by the same deed of trust, which bore the same date as the deed of conveyance from the trustee to Joseph Franklin Seitz. These two deeds are in the usual form of such conveyances, and their contents serve to throw no light upon the controversy between the parties to this suit. But it may be added that it seems to be very clear from the testimony that the money wherewith to pay the indebtedness secured by the deed of trust was provided by John F. Seitz.

Subsequently, by a deed dated on April 11, 1879, and recorded on April 3, 1883, nearly four years after its execution, which is the deed that has given rise to the present controversy, Joseph Franklin Seitz conveyed a life estate in the property to his mother, Mary Elizabeth Seitz, the wife of George Seitz, and a remainder in fee simple in two undivided third parts to Alice E. Seitz, the wife of his elder brother, John F. Seitz, and Charles Leo Seitz, a younger brother, who had just become of age a few months before the execution of the deed, having been born in January, 1858. As upon the construction of this deed the determination of the controversy depends, it seems proper that it should be here given in full, with all its recitals. It is as follows:

“This indenture made this eleventh day of April in the

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year of our Lord one thousand eight hundred and seventy-nine by and between Joseph Franklin Seitz, of the city of Washington, District of Columbia, party hereto of the first part, and Mary Elizabeth Seitz, of the same place, party hereto of the second part, and Charles Leo Seitz and Alice E. Seitz, wife of John F. Seitz, of the same place, parties hereto of the third part:

"Whereas the said Joseph Franklin Seitz did, on or about the 23rd day of October, A. D. 1877, purchase from R. Ross Perry, trustee, in a cause then pending in the Supreme Court of the District of Columbia, between John T. Mitchell and George Seitz et al., said cause numbered 2973 equity docket, the hereinafter-described premises, and has since received a conveyance of the title to the said premises from the said trustee:

"And whereas the said party of the first part in making the said purchase was acting, not for himself alone, but also for his brother Charles Leo Seitz, and John F. Seitz, husband of the said Alice E. Seitz, from whose labors jointly with his own the purchase money of the said property had been derived:

"And whereas the said party of the second part is the mother of the said Joseph Franklin Seitz, Charles Leo Seitz and John F. Seitz, who are anxious to provide for her during her life in consideration of the natural love and affection which they entertain for her and in recognition of her assistance to them in their business endeavors:

"Now, therefore, this indenture witnesseth that the said parties of the first and third parts, with the concurrence of the said John F. Seitz, in consideration of the premises and of the natural love and affection which they feel for the said party of the second part, and further in consideration of the sum of five dollars, current money of the United States, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, aliened, enfeoffed, released, conveyed and

confirmed, and do by these presents, grant, bargain and sell, alien, enfeoff, release, convey and confirm, unto the said party of the second part for the term of her natural life all that lot of ground situate in the city of Washington, District of Columbia, and known on the ground plan thereof as all that part of lot numbered one, in square numbered three hundred and forty-three (343), contained within the following metes and bounds (*here follows a specific description of the property by metes and bounds*), together with all the improvements, rights, tenements, appurtenances and hereditaments to the same in any manner belonging or pertaining.

“To have and to hold the said premises as described and the appurtenances thereof unto and to the use of the said party of the second part during her natural life for her sole and separate use, and for that purpose and for such term only.

“And the said party of the first part, with the acquiescence of the said John F. Seitz, and in recognition of the implied trust upon which he purchased the said premises, and further in consideration of the sum of five dollars in lawful money of the United States to him in hand paid by the said parties of the third part at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, aliened, enfeoffed, released, conveyed and confirmed, and doth by these presents, grant, bargain and sell, alien, enfeoff, release, convey and confirm unto the said parties of the third part, their heirs and assigns, two undivided third parts of the hereinbefore described premises, with the appurtenances thereof, subject to the life estate of the said party of the second part: To have and to hold the said two undivided third parts of the hereinbefore described premises, with the appurtenance thereof, unto and to the use of the said parties of the third part, their heirs and assigns, to their sole use, benefit and behoof forever.

“In testimony whereof the said parties of the first and

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third parts and the said John F. Seitz, have put their hands and seals hereunto on the day and year first hereinbefore written.

(Signed)

"JOSEPH FRANKLIN SEITZ. [Seal.]

"ALICE E. SEITZ. [Seal.]

"CHAS. L. SEITZ. [Seal.]

"JNO. F. SEITZ. [Seal.]

"Witness:

"WM. HELMICK."

(Here follows the certificate of acknowledgment in due form over the signature and seal of Wm. Helmick, Justice of the Peace).

On August 16, 1890, Charles Leo Seitz, who had been secretly married in 1879, a short time after the execution of the deed just mentioned, died intestate, leaving surviving him his wife, Nellie Seitz, and three children, the appellees, Arthur Seitz, Mary Seitz and Lottie Seitz, who are his heirs at law, the oldest of them not having reached the age of ten years. On June 24, 1891, Joseph Franklin Seitz, at the request and by the procurement of John F. Seitz, conveyed to the appellant, Alice E. Seitz, wife of John F. Seitz, the one-third interest in the property which he had retained from the preceding deed, for the consideration, as it appears both from the deed itself and the testimony, of \$4,200—although from the testimony in the case there would appear to be some element of mystery about the matter. On January 5, 1895, Mary Elizabeth Seitz, the life tenant, died, leaving surviving her her husband, George Seitz, who appears in the case as a witness for the appellants.

By a deed bearing date on January 8, 1895, the appellant, Alice E. Seitz, then apparently claiming the whole property as her own, conveyed it to appellants, Eugene Carusi and Robert E. L. White, as trustees, to secure to the appellant, Ida V. S. Greer, the repayment of a loan of \$6,600, payable five years thereafter, with interest at six per centum per annum, payable semi-annually; and in the execution of this

deed her husband, John F. Seitz, united with her. It is conceded that the proceeds of the loan were used in part to pay the deferred portion of the original purchase-money which had been secured by the deed of trust given by Joseph Franklin Seitz under date of September 24, 1878.

Subsequently, on August 15, 1896, the minor children of Charles Leo Seitz, by their mother, Nellie Seitz, as their next friend, claiming that the deed from Joseph Franklin Seitz of April 11, 1879, heretofore set forth in full, was a conveyance to Alice E. Seitz and their father, Charles Leo Seitz, as tenants in common and not as joint tenants; that under it he took one-third undivided part of the property in severalty, and that they as his heirs at law were now entitled to such one-third part, filed in this cause their bill of complaint for the determination of their right, a sale of the property for the purpose of partition, and for an accounting as to the indebtedness thereon and the proportion of such indebtedness chargeable against their interest in the premises. The bill was filed against Alice E. Seitz and John F. Seitz, her husband, and against the trustees and beneficiary named in the deed of trust given by Alice E. Seitz and John F. Seitz under date of January 8, 1895—all of whom contested and denied the right of the complainants to any interest in the property; maintained that as between Alice E. Seitz and Charles Leo Seitz the deed of April 11, 1879, from Joseph Franklin Seitz created a joint tenancy, and not a tenancy in common; and that, in consequence of it, upon the death of Charles Leo Seitz in 1890, Alice E. Seitz, by the right of survivorship incident to joint tenancy, took the whole and entire estate in the two-thirds undivided parts conveyed to the two of them by that deed, to the exclusion of the children of Charles Leo Seitz.

Testimony was taken on both sides, most of it probably incompetent and inadmissible. It appears from it, however, that the property is now of the value of about \$9,000 or \$9,500; that, in 1877 and for many years before and

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after that time the bakery business was conducted upon the premises by George Seitz, the father, and John F. Seitz, his oldest son, as partners, under the firm name of George Seitz and Son; that Joseph Franklin Seitz and Charles Leo Seitz worked with them and in their employment as journeymen, with rather a loose connection, as was perhaps natural under the circumstances; that Charles Leo Seitz was physically somewhat afflicted, and was also intemperate, and without means other than the small wages which he received in the bakery; that he worked irregularly, and finally quit the place; that John F. Seitz, especially in the later years, became the principal manager of the business and of the property, paid the taxes and insurance on the latter, paid also the interest due on the deferred purchase money and for all repairs and improvements made upon the property; and that he was a man of some means. It is claimed, also, on behalf of John F. Seitz, that he raised or furnished the sum required for the cash payment on the purchase in 1877. But it is proper to say that the testimony in the case seems not to have been much, if at all, relied upon by either side in the court below, or by that court in reaching its final determination in the case; nor was it relied upon in the argument in this court.

The justice holding the equity court, in a very able and ingenious opinion, held that the deed from Joseph Franklin Seitz, of April 11, 1879, created a tenancy in common, and not a joint tenancy, as between Alice E. Seitz and Charles Leo Seitz; and consequently he rendered a decree in favor of the complainants in the suit, whereby he adjudged that Charles Leo Seitz was the owner of one undivided third interest in the property as a tenant in common, and that this interest descended to the complainants as his heirs at law. And then he proceeded to order a sale of the whole property for the purpose of partition. The decree further adjudged that in the distribution of the proceeds of sale, one-third of the portion of the original purchase money

secured by the deed of trust of September 24, 1878, should be charged against the one-third interest decreed to be in the complainants, and the residue of the original deferred purchase money and the residue of the loan of January 8, 1895, should be charged against the two-thirds interest adjudged to be in Alice E. Seitz.

From this decree the defendants have appealed to this court.

*Mr. R. Ross Perry, Mr. Henry P. Blair, Mr. Wm. J. Miller and Mr. Eugene Carusi* for the appellant:

1. The common-law doctrine of joint tenancy, with its incident of survivorship, exists as fully and rigorously in this District as it did at common law in England. *O'Brien v. Dougherty*, 1 App. D. C. 148. In order, therefore, to escape the application of this doctrine, it is necessary to show that within the four corners of the deed in question there can be found evidence of an intention on the part of its parties to create a tenancy in common as contradistinguished from a joint tenancy.

Upon an examination of the language of the deed in question, the only word in it which can be found to base a destruction of the joint tenancy upon, is the word "sole" in the *habendum* clause. This word is interpreted by the court below as meaning separate. But the same word is used in a prior part of the same deed. In a prior *habendum* clause the property is to be held "unto and to the use of the said party of the second part during her natural life, for her sole and separate use." Whatever other meaning may be given to the word sole in this connection, it can not be interpreted to mean separate; because the parties have employed it in contradistinction to that word. Therefore, when they again employ the word sole subsequently in the second *habendum* clause, and exclude the word separate, they clearly indicate whatever else they may mean, they do not mean separate. But if the word sole can not be interpreted as

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qualifying the separate interest of the grantees, it must necessarily qualify their joint interest. However that joint interest be qualified, it remains joint, and the incident of survivorship attaches to it.

It is well settled that when property is vested in two or more persons by the same joint purchase there arises at once, both at law and in equity, the presumption that it vested an estate in joint tenancy; and that this presumption can be overthrown in equity only by proof of circumstances from which the court can infer that the parties intended a several rather than a joint estate. Freeman, Co-ten. & Part., Sec. 18; *Lake v. Craddock*, 1 Lead. Cases Eq., 227 note (2d Am. Edit.).

The recital in the deed that Joseph Franklin Seitz, in purchasing the property, "was acting not for himself alone, but also for his brothers, from whose labors, jointly with his own, the purchase money of the said property had been derived," can not be relied on as evidence of an intention to create a tenancy in common. The presumption is that the purchase money was contributed equally; and this fact, so far from evidencing an intention in the purchasers to create a tenancy in common, is rather regarded in equity as "a purchase by them jointly of the chance of survivorship." 2 Cruise, Title XVIII, Ch. 1, Sec. 35; *Lake v. Gibson*, 1 Lead. Cases Eq., 223 (3d Am. Edit.); 2 Story Eq. 617, Sec. 1206; 2 Sugd., Vendors, Ch. XX, 901, Sec. 1.

Whatever weight, however, is to be given to the words "sole use, benefit and behoof," when they occur in the granting part of the deed, certainly when they occur in the *habendum*, they are to be taken to be simply the ordinary conveyancing form of expression usual in that part of the instrument, and are insufficient to warrant the inference of an intention to create a tenancy in common. *Lippincott v. Mitchell*, 4 Otto, 767.

*Messrs. Gordon & Gordon* for the appellees:

1. No testimony is admissible on behalf of the defend-

ants to vary or contradict the recitals solemnly set forth in the deed under which the parties have derived their title, and in which the grantor declared in express terms that the purchase was made for the three brothers from "whose labor jointly with his own purchase money of the said property has been derived." Their title is based upon the deed, containing the recital, and they should certainly be estopped from denying the facts recited as the basis of their interest, and upon which the trust set forth in the original holding of Joseph Franklin Seitz, the grantor, is founded, and the said recitals should be conclusive as against them. Greenleaf, Sec. 26; 20 Am. & Eng. Encyc. L. 456; Devlin on Deeds, Sec. 997.

2. The original holding by Joseph Franklin Seitz was in trust for himself and his two brothers as tenants in common in equal shares. Where the consideration proceeds from two or more persons jointly, and the conveyance of the legal estate is taken in the name of one of them only, "a resulting trust will arise in favor of the parties not named in the conveyance, in proportion to the amount of the consideration which they respectively may have contributed." Hill on Trustees, 149. But in the present case it is not necessary to resort to evidence to establish the resulting trust, because we have the statement of the holder of the property, under seal, that he held the property, as trustee, for his brothers jointly with himself.

3. The generally accepted rule is, that joint tenancies are not favored in equity, and that the courts will view all circumstances connected with a transaction in order, if possible, to prevent the creation of a joint tenancy. Hill on Trustees, 150; Freeman on Cotenancy, Sec. 18. Certainly if there was ever a case in which an equity court might feel justified in applying the above rule, and in exercising the utmost "acuteness" in endeavoring to find from the circumstances surrounding the case, as set forth in the deed itself, an intention to create a tenancy in common, the

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present is one of that class. Here the rule of survivorship applies with peculiar rigor. Three infant defendants are endeavoring to defend their title in property which no reasonable person can suppose it was intended that their father did not own, but which, owing to the greed of their uncle, and the strictly technical rules of law, they are in danger of losing, and surely the court will do all that it can, not merely as a matter of equitable justice to the claimants, but also as a rebuke to the cupidity of their unnatural relative, and to the maintenance of public morality, to vindicate their contention and follow the modern tendency which, even independent of the statutes on the subject, is in favor of such a construction as will give an estate in common. *Campbell v. Heron*, 1 Tayl. 191; *Caines et al. v. The Lessee of Grant*, 5 Binn. 119.

The extent to which the courts have gone is well illustrated in the case of *Bambaugh v. Bambaugh*, 11 S. & R. 191, and the case of *Galbraith v. Lessee of Galbraith*, 3 S. & R. 391.

Black in his Law Dictionary defines the word "sole" as follows: "Sole, single, individual, separate, the opposite of joint, as 'sole tenant.'" And the Standard Dictionary of the English Language defines the word as follows: "Being alone, existing or acting without another; individuals." So that, in the light of these general definitions, we may readily read the language—"unto and to the use of the said parties of the third part, their heirs and assigns, to their sole use, benefit and behoof forever," as meaning to the grantees' use, and to the use of their heirs and assigns, to their use, solely, or singly, or separately, and as individuals. We do not think this interpretation would transgress the tendency of the courts, and surely, in the present case, would be in strict accordance with justice and equity.

Mr. Justice MORRIS delivered the opinion of the Court :

It is with great regret that we find ourselves constrained

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to reach a different conclusion in this case from that reached by the learned justice who rendered the decree in the court below. We fully recognize the fact that, however the case may have been in the past, neither in our own country nor in England at this day is the construction favored that would make a joint tenancy rather than a tenancy in common. It has been said that courts of equity are even astute to find reasons for the construction that from any given instrument of writing would raise a tenancy in common, rather than a joint tenancy. And it is undoubtedly true, that, in the vast majority of cases substantial justice is done and effect given to the true intention of the parties by such construction.

At the same time, we are compelled also to recognize the fact that it is an inflexible and inexorable rule of the common law, repeatedly declared to be in force in the District of Columbia, and become an absolute rule of property, which could not be disregarded without disturbing a vast number of titles and unsettling the whole law of real estate, that a conveyance of land to two or more persons, without any sufficient indication of intention in the instrument of conveyance that the grantees are to hold in severalty, is to be construed as a joint tenancy, and not as a tenancy in common, whatever may have been the true intention of the parties in that regard. We know that this rule of the common law has been changed almost everywhere else by statute; but the Congress of the United States has not yet thought proper to change it in the District of Columbia, notwithstanding that its attention has been called to the subject; and we are bound by the rule as it stands.

We are not entirely certain, however, that in applying the rule in the present case, we are frustrating the intention of the parties. There are many cases of family settlement, and for all that we know to the contrary this may be one of them, where the idea of survivorship and the retention of property in the hands of those immediately concerned, is

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the dominant idea, and the application of the law of joint tenancy works no wrong to their purpose. But, however this may be, the law is inexorable wherever it applies, even though its results should be to exclude the claims of helpless infancy; and the only question for us here to determine is whether it applies in this case.

Extraneous considerations are not to be regarded. The great mass of the testimony in the case is probably inadmissible. The terms of the written instrument can not be varied or explained by oral evidence; and there is no latent ambiguity to be removed by a consideration of extraneous circumstances. Indeed, the testimony, such as it is, does not serve to throw light upon the matter of controversy. The court below disregarded it; and it was practically disregarded in the argument before us. We are remitted to the deed itself exclusively for its own construction.

Beyond all question, the granting clause in the deed, if taken alone, and without reference to the previous recitals or to the subsequent *habendum* and *tenendum* clause, creates a joint tenancy, and nothing else. The grant is "unto the said parties of the third part, their heirs and assigns," words which from time immemorial have always and invariably, in the absence of statutory provisions to the contrary, been construed as creating a joint tenancy. This much, of course, is not controverted by any of the parties to the controversy.

But it is claimed that by the previous recitals, by an expression in the *habendum* and *tenendum* clause indicating severalty, and by the fact that the conveyance itself operates as a severance, in favor of the grantor, of the joint interest declared by the deed to have previously existed in him in trust, and that no reason appears thereafter for the continuance of a joint interest in the other parties, enough appears to warrant a construction of the instrument as creating a tenancy in common. The learned justice, who rendered the decree in the court below, bases his conclusion

upon the *habendum* and *tenendum* clause and finds nothing in the other considerations that would justify a departure from the legal effect of the granting clause.

The recital of the deed, from which it is sought to infer a common interest of the grantees in severalty, is that in which the grantor states that he, "in making the said purchase, was acting, not for himself alone, but also for his brothers, Charles Leo Seitz and John F. Seitz, from whose labors jointly with his own the purchase money of the said property had been derived." But plainly no such inference is tenable. The recital amounts to no more than a statement that the purchase money had been paid jointly by all three parties, and this is only what happens, or what is presumed, in all cases of joint tenancy, as well as in all cases of tenancies in common, where no inequalities otherwise appear. The presumption is of equal and joint payment in both cases; and no inference either way can be drawn from any such payment. There are cases where inequalities of payment, especially where such inequality appears on the face of the deed itself, has been held to convert that which otherwise would be construed as a joint tenancy into a tenancy in common; and this construction, of course, is based upon obvious reasons of justice. But no such reasons exist in the case of equal contributions by all of the grantees; for joint tenancy, as well as tenancy in common, gives each an equal right in the estate, with equal right of survivorship and equal right of severance by the parties at will. To hold that a showing of equal contribution to the purchase money would establish of itself a tenancy in common, and not a joint tenancy, would destroy all joint tenancy, except where it was expressly declared; and would, therefore, contravene the well-established rule of law. And to this effect undoubted are all the authorities on the subject, which are unaffected by statute. *Lake v. Gibson*, 1 Leading Cases in Equity, p. 177; 1 Sugden on Vendors and Purchasers, 11th Ed., p. 902; *Aveling v. Knipe*, 19 Ves. 441; 11 Amer. & Eng.

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Encyclopedia of Law, Art. Joint Tenancy, p. 1059. If the grantees in this case had been partners, and it appeared that the purchase money was derived from partnership assets, there would be reason to hold that a tenancy in common, and not a joint tenancy, was intended. But there is no claim of the existence of any such partnership. The only partnership shown to have existed was between John F. Seitz and his father, George Seitz; and if the purchase money in the case did not come from George Seitz, who however does not make claim to it, it is quite probable that it came from the partnership of George Seitz and Son. But this fact, if fact it be, does not at all aid the case of the appellees.

Greatest reliance is placed by the appellees upon the indication which they claim to be afforded by the use of the word *sole* in the *habendum* and *tenendum* clause. The argument is that the word means *several*; and that, when it was provided that the grantees should hold the property granted "to their *sole* use, benefit and behoof forever," the terms used were the equivalent of "their *several* use, benefit, and behoof forever." But we can not acquiesce in the soundness of this argument. The word *sole* does not mean *several*. No authority, legal or philological, is or can be cited where it has any such meaning attributed to it. Its signification is well recognized to be the same as *only* or *exclusively*; and the purpose of the clause, so far as any purpose can be attributed to such unnecessary verbiage, is to provide that the grantee or grantees shall hold the property granted exclusive of all the rest of the world. It would be a most strained and unnatural conclusion, and one which in all probability would greatly disturb and unsettle titles, if such words were to be construed as determining the respective rights of the grantees as between themselves.

As was said by this court, through the Chief Justice, in the case of *Rathbone v. Hamilton*, 4 App. D. C. 475, 489, the words quoted are no more than "a common formula found

transcribed in many deeds," and in that case they were held not to be intended to create a separate estate in a married woman.

To the same effect is the case of *Lippincott v. Mitchell*, 94 U. S. 767, 771, where the same or similar words were construed. There the controversy was also, as in the case of *Rathbone v. Hamilton*, whether a deed had created a separate statutory estate in a married woman, and the terms relied upon as creating such estate, and which occurred in the *habendum* and *tenendum* clause, were the following: "to the sole and proper use, benefit, and behoof of the said Nannie C. Mitchell, her heirs and assigns forever." Construing these words and the effect of the deed, the Supreme Court of the United States said:

"If it were intended by this deed to give the wife a separate estate, it is remarkable that in the mass of redundant verbiage employed no words clearly apt for that purpose are to be found. It is remarkable, if such an intent existed, that the phrase 'for her separate use,' or 'for her exclusive use,' or 'free from the control of her present or any future husband,' or some equivalent for one of them, was not inserted. The omission can only be accounted for upon the hypothesis that the idea of separate estate was not in the mind of either of the parties, and that hence no instruction was given upon the subject to the draftsman of the deed. There is nothing in the record to warrant the belief that the purchase and conveyance were not intended to be such a transaction in the ordinary way, without securing to the grantee any special rights touching the property, or any right other than the ownership in fee simple. The only part of the deed which gives a shadow of support to the proposition of the appellants is the language of the *habendum*. The same language is to be found in many precedents in books of forms, where certainly there was no purpose to create a separate estate."

And the court holds that the word *sole* in these forms is

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the equivalent of the word *only* in the older English precedents.

This seems to us to be conclusive of the present case. The draftsman of the deed now before us for construction was evidently somewhat familiar with the legal forms of expression and the general requirements of a deed. This is clearly manifested by the general phraseology of the deed and by the evidence of the recitals. If he was utterly ignorant of the difference between a tenancy in common and a joint tenancy, which we would be compelled to assume by the argument of counsel for the appellees, it is strange that such ignorance was not otherwise manifested. The law upon the subject was well settled and uniform; and it was not unknown even to the class of laymen in the District of Columbia, to whom recourse was often had for the preparation of deeds, as well as for their acknowledgment. Adapting to the present case the language of the Supreme Court of the United States in the case above cited of *Lippincott v. Mitchell*, it is very remarkable that, in the mass of redundant verbiage employed in this case, no words clearly apt for the creation of a tenancy in common are to be found, if it was the intention to create such a tenancy; and the omission can only be accounted for upon the hypothesis that the idea of a tenancy in common was not in the mind of either of the parties, and therefore no instruction was given on the subject. The probabilities, indeed, are that nothing was said or thought by any of the parties to the transaction with reference either to joint tenancy or tenancy in common; but this leaves them to the application of the ordinary rules of the common law as to the construction of the instrument which they executed. But, as if corroborating this view of the case, it is to be noted that the draftsman of the deed, in providing for the separate estate of the life tenant, Mary Elizabeth Seitz, a married woman, and the wife of George Seitz, was very careful to use apt words—"for her sole and separate use, and for that purpose only."

The cases of *Galbraith v. Galbraith*, 3 S. & R. 391, and *Bambaugh v. Bambaugh*, 11 S. & R. 191, are cited as holding a contrary view to that herein expressed. But in the first of those cases, the grant was "to them (the grantees), or any of them, their or any of their heirs," and the court construed the word *any*, which otherwise perhaps would have been absurd and meaningless, to be the equivalent of the word *each*, thereby creating a tenancy in common; and in the second, the case of *Bambaugh v. Bambaugh*, the *habendum* clause contained the words, "to their and *each* of their heirs and assigns," which the court construed as overcoming the result of the technical words in the premises which would have created a joint tenancy. It is evident that these words could have had no force or effect except upon the implication of a tenancy in common. We are unable to see that they resemble the present case in any respect.

The case of *Barribeau v. Brandt*, 17 How. 43, is also cited in the same connection. But the deed construed in that case does not appear in the report of the case; and a careful reading of the case would indicate that the joint estate, even if such it was, had been severed by the action of the joint tenants themselves. This case can not be regarded as an authority against the position which we have taken.

It is unnecessary to discuss at much length the third consideration heretofore indicated, namely, the fact that the original joint interest recited by the deed to have been in the grantor, Joseph Franklin Seitz, and his two brothers, John F. Seitz and Charles Leo Seitz, was severed, as to the grantor on the one hand and the grantees on the other, by the very execution of the deed, and no reason appears why there should not have been a severance between the grantees also. The views of the parties are not disclosed to us except by the deed itself; and there is no inconsistency, legal or equitable, in the severance of his interest by one brother and the continuance of the others in a joint tenancy. Even after the execution of the deed it was competent for the two

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grantees to sever their interests, if they thought proper so to do. If their failure so to do was in consequence of their ignorance of their respective rights under the deed, that is a consideration of which we can not here take cognizance.

Entertaining the view of the law which we have here expressed, we are compelled to *reverse the decree of the court below, with costs; and to remand the cause to that court, with directions to dismiss the bill of complaint.*

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TOWSON v. MOORE.

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CONTRACTS; UNDUE INFLUENCE; PRESUMPTION; EVIDENCE.

1. The undue influence for which a will or deed will be annulled must be such that the party making it has no free will, but stands *in vinculis*; it must amount to force or coercion, destroying free agency.
2. The presumption of the exercise of undue influence does not arise except where an advantage has accrued to a party under conditions of existing beneficiary or confidential relations which make it incumbent on the party to show the fairness of the transaction drawn in question; and in general, the burden of proving such undue influence is on the party alleging it.
3. The declarations of a testator or grantor, made either before or after the execution of the will or deed, or of the transaction complained of, are not admissible in evidence to show such undue influence, although they may be admitted to show mental condition.
4. Influence gained by kindness and affection will not be regarded as undue, if no imposition or fraud be practiced, even though it induce a testator or grantor to make an unequal and unjust distribution of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made.

No. 678. Submitted October 12, 1897. Decided November 1, 1897.

HEARING on an appeal by the complainants from a decree dismissing a bill for an accounting. *Affirmed.*

This is a suit in equity for an accounting, in which the facts evolved, so far as they are here necessary to be stated, would seem to be as follows:

- William H. Campbell, an old resident of the city of Washington, died on May 21, 1881, leaving a will bearing date on March 16, 1878, and thereafter duly admitted to probate, whereby, after certain specific legacies to his three children, all of whom were then living, and an annuity to a sister, Eloise Campbell, he devised and bequeathed all the rest and residue of his estate to his wife, Mary I. Campbell, in fee simple, with remainder over to his three children, as tenants in common, in the event that his wife should not survive him. Mary I. Campbell survived her husband and took the estate. Of their three children, one, a son, Leonidas C. Campbell, who had been in partnership with his father in his business, died on August 15, 1878, before his father, intestate, as it would seem, and leaving, as his personal representatives and heirs at law, his wife, Mary Kennedy Campbell, who is made a party to these proceedings as committee of their son, William H. Campbell—but why such committee is not stated—and seven children, of whom there were three now married daughters, the appellants, Blanche K. Towson, Edith G. Graham and Nannie C. Towson; and four other children, the appellants, John C. K. Campbell, Mary L. I. Campbell, William H. Campbell (above mentioned), and a daughter May, who intermarried with Henry D. Fry, and has since deceased, leaving two minor children, Gertrude Fry and Edith Fry, who are made parties to the bill of complaint as defendants, but who seem never to have been served with process, or otherwise in any manner brought into the proceedings. The two other children of the testator, William H. Campbell, survived. Both were daughters, of whom one, Julia, intermarried with Alexander W. Russell, and the other, Christiana, intermarried with Frederic L. Moore. These four, with the minors above mentioned, are the defendants in the cause and the appellees in the present appeal. The

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Statement of the Case.

will of William H. Campbell is not involved in the present suit, and seems to be referred to only as supposed to throw light on the subsequent transactions.

Mary I. Campbell, the widow, devisee and legatee of William H. Campbell, died on August 6, 1893, leaving a will executed on May 26, 1882, whereby, after some minor bequests not here important to be noted, she left all the rest and residue of her estate to be equally divided in three equal portions between her two daughters, the appellees Julia A. Russell and Christiana V. Moore, and the children of her deceased son, Leonidas C. Campbell, and which will was also duly admitted to probate. Mrs. Campbell at the time of her death had reached the advanced age of ninety-one years. Her last illness was only of three days' duration; and she seems to have remained in the full use of her mental faculties and in reasonably good physical health and vigor, with no more than occasional petty ailments and the natural decrease of strength incident to old age, almost to the last.

Frederic L. Moore and Alexander W. Russell, her two sons-in-law, were the executors of the will of Mrs. Mary I. Campbell, with power to dispose of all the property, real and personal; and they had also been, with Jourdan W. Maury, the executors of the will of William H. Campbell. The estate of William H. Campbell was duly administered and settled. Of the estate of Mary I. Campbell the executors filed their first and final account on November 23, 1894, and all had been disposed of in accordance with the will, except that one piece of real estate remained unsold, when the bill of complaint in this case was filed on April 16, 1896.

Mention has been made of an annuity left by William H. Campbell in his will to his sister, Eloise Campbell. At his death, for the purpose of paying that annuity, his executors set apart United States bonds of the par value of \$13,000, and kept them intact during the life of the annuitant. She died on October 1, 1885; and the bonds thereupon became

part of the residue of the estate bequeathed to Mrs. Mary I. Campbell, the widow. On October 5, 1885, they were transferred to her on the books of the Treasury Department; and on the next day, October 6, 1885, she made a gift of them, their market value at that time being about \$15,000, in equal shares to her two daughters, the appellees Christiana V. Moore and Julia A. Russell. It is the question of the validity of this gift that constitutes the gist of the present suit. It is claimed that the transfer to Mrs. Moore and Mrs. Russell was procured by undue influence exercised by them and by their husbands. But the bill of complaint is filed with the double aspect, either of having the transaction declared void on the ground of undue influence, or of having the gifts construed as advancements, and *pro tanto* as an ademption of the legacies bequeathed to the daughters of Mrs. Mary I. Campbell in her will.

As already stated, the bill of complaint was filed on April 16, 1896; and it sought to charge the executors in the final settlement of their accounts with the value of the bonds in question as having been received by Mrs. Moore and Mrs. Russell on account of their several distributive shares of their mother's estate. The answers of the several defendants, other than the minors, who never appeared in the case, and whose interests, of course, are identical with those of the complainants, fully and emphatically denied all the substantial allegations upon which the bill was based.

After replication filed and testimony taken, the court below, when the cause came on for hearing, dismissed the bill; and from the decree of dismissal the complainants have prosecuted the present appeal.

*Mr. Arthur A. Birney* for the appellants.

*Mr. Charles H. Cragin* for the appellees.

Mr. Justice MORRIS delivered the opinion of the Court:

1. The theory of the bill of complaint, that the transfer

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of the bonds in question by Mrs. Mary I. Campbell, to her two daughters, if voluntary, was not intended by her as a gift *inter vivos*, but as an advancement to them on account of their respective legacies under her will, is wholly unsustainable by proof of any kind, is flatly denied by the defendants, and is not insisted on in argument before us. It may, therefore, be dismissed at once from our consideration.

2. The controversy really turns upon the question of the alleged undue influence claimed on behalf of the appellants to have been exercised upon Mrs. Mary I. Campbell by her two daughters and their husbands; and upon the determination of this question depends the determination of the cause.

Undue influence, says the Supreme Court of the United States, in the case of *Conley v. Nailor*, 118 U. S. 127, 134, "the undue influence for which a will or deed will be annulled must be such as that the party making it has no free will, but stands *in vinculis*. It must amount to force or coercion, destroying free agency (citing *Stulze v. Schaeffle*, 16 Jurist, 909; *Williams v. Goude*, 1 Hagg. Eccl. 577; *Armstrong v. Huddleston*, 1 Moore P. C. 478)." In this same connection that court cites with approval the case of *Eckert v. Floury*, 43 Pa. St. 46, and the case of *Davis v. Calvert*, 5 Gill & J. 269, 302, in both of which the same doctrine is laid down in substantially the same language.

Undue influence, it is true, is in general a subtle influence, a species of fraud, difficult to be proved, and difficult to be disproved. In general, its existence can only be established by circumstantial evidence, and by a concatenation of circumstances. The presumption of its exercise does not arise except where an advantage has accrued to a party under conditions of existing fiduciary or confidential relations which make it incumbent on the party to show the fairness of the transaction drawn in question. In general, the burden of proving such undue influence is on the party alleging it. *Boyse v. Roseborough*, 6 H. L. Cases, 2; *Davis v. Davis*,

123 Mass. 590; *Webber v. Sullivan*, 58 Iowa, 260; *Conley v. Nailor*, 118 U. S. 135. This burden the complainants undertook in the present case; but we think that they have wholly failed to establish their charge by any sufficient evidence, and that, on the contrary, the evidence in favor of the defendants in disproof of the charge is overwhelming. In fact, if we were wholly to disregard the testimony on behalf of the defendants, we would have to hold, on the showing of the complainants themselves, that they had not proved their case.

Beyond the fact of some unimportant and irrelevant testimony that both William H. Campbell and Mary I. Campbell always intended to treat their children and descendants equally and to divide their estates equally between them, the only substantial testimony on behalf of the complainants, if such it can be called, to establish the charge of undue influence, is contained in the deposition of one of their witnesses, Mrs. Laura Ellen Baker, who testified as follows:

"She (Mrs. Mary I. Campbell) told me that Mrs. Moore and Mrs. Russell had made her promise that, if she was to outlive Miss Eloise Campbell, she would divide \$12,000 between them equally, and that they worried her so, to get rid of them she promised them."

"After her death (the death of Eloise Campbell) she (Mary I. Campbell) told me she had divided it equally between Mrs. Moore and Mrs. Russell—\$12,000, she told me, which she supposed her husband had laid aside for the support of Miss Eloise. After she told me she had divided this money equally, she wanted the rest of her money to go to her grandchildren."

Mrs. Baker at first testified that this conversation between Mrs. Campbell and herself occurred within less than a year before Mrs. Campbell's death (which occurred, as already stated, in August of 1893.) Afterwards she returned to correct her testimony, and stated that it occurred about a month or six weeks after the death of Eloise Campbell (which was

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on October 1, 1885). She testified, likewise, with considerable particularity that the conversation took place in a room in the house of Mr. and Mrs. Moore, with whom Mrs. Mary I. Campbell was then staying.

Notwithstanding that she further testified that, when this conversation occurred, she was alone with Mrs. Campbell, it was sought by the complainants to corroborate her testimony by that of her daughter, Eliza Burgess Baker, who was called in rebuttal to testify that she was present at the time with her mother in the room in the house of the Moores, and heard the conversation. A witness, Thomas Brooke, was also called in rebuttal to testify that Mrs. Baker had repeated the alleged conversation to him in or about the month of October, 1885. Mrs. Mary Kennedy Campbell, the mother of the complainants, also testified to having had the conversation repeated to her by Mrs. Baker "just as soon as Mrs. (Mary I.) Campbell told her," and "a very short time" after the death of Eloise Campbell.

Besides the inherent improbabilities and inconsistencies of this story, it is shown conclusively that no such conversation could have occurred at the time and at the place specified. For it is proved as conclusively as human testimony can prove anything, that at the time of the alleged conversation, Mrs. Mary I. Campbell was not at the house of the Moores; that in consequence of the intended absence of the Moores from the District of Columbia on account of the surgical treatment needed to be administered to Mrs. Moore in New York, Mrs. Mary I. Campbell left their house between the 10th and 15th of October, 1885; that she went immediately to reside with their married daughter, a Mrs. Tenney; that she returned to their house when they returned from New York, about the middle of December following; that she remained with them until June of 1886, when they went to Europe, and she went to reside with Mrs. Russell in Philadelphia; that she remained with Mrs. Russell until 1891, when she returned to the house of the Moores, with whom

she continued to reside until her death. It is more probable, therefore, that if the alleged conversation between Mrs. Mary I. Campbell and Mrs. Baker took place at all, it occurred at the time first stated by the latter; that is, a little while before Mrs. Campbell's death; and that it may well have been the result of some temporary annoyance or irritation incident to her advanced years and failing health.

Opposed to any inference of undue influence which might be deduced from such alleged conversation is the deliberate statement in writing of Mrs. Mary I. Campbell on two different occasions. Discontent, it seems, had been engendered in the mind of Mrs. Mary Kennedy Campbell on account of some supposed inequality in the will of William H. Campbell; and some ill feeling had resulted between her and the other members of the family, apparently including also Mrs. Mary I. Campbell, her mother-in-law. But there was some semblance of reconciliation before the death of Miss Eloise Campbell in 1885, when Mrs. Mary I. Campbell, wrote in her own handwriting a statement, one copy of which was sent to her daughter Julia, and one to Mrs. Mary K. Campbell, in which she stated that no undue influence had been used by her daughter Julia in the making of her father's will, as had been charged against her; and that the legacies left to his two daughters in that will did not equalize them with his son, Leonidas, and that the books (presumably the books of the firm of W. H. Campbell & Son) even then, in 1885, showed that the son had received \$6,897.52 more than the daughters had received.

Again, on October 6, 1885, the day of the gift which is in controversy here, Mrs. Mary I. Campbell, for the purpose, as it is stated, that there should be some written evidence of the transaction, in view of the discontent previously manifested, wrote and signed a paper, in which she stated that she had "voluntarily, and without suggestion from any one," given the bonds in question to her two daughters, in order

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to "equal their share with the amount received by their brother and his family."

According to her own testimony, Mrs. Mary Kennedy Campbell had knowledge of this gift soon after it was made; and she had in her possession the previously executed statement by Mrs. Mary I. Campbell that her son Leonidas and his family had received \$6,897.62 more than either of the daughters; and yet for more than ten years afterwards, and until the filing of the bill of complaint in the present case, the record shows no protest whatever of any kind by her or by any one against the correctness of the statement or the propriety of Mrs. Mary I. Campbell's action, and no investigation whatever of any kind by her to ascertain the facts. The record, on the facts alone, is conclusive against the position and contention of the appellants.

But even if we assumed the truth and entire correctness of the statement claimed to have been made by Mrs. Mary I. Campbell to Mrs. Baker, it would be insufficient, either in law or in fact, to establish the existence of undue influence. The declarations of a testator or grantor, made either before or after the execution of the will or deed, or of the transaction complained of, are not admissible in evidence to show such undue influence, although they may be admitted to show mental condition (*Venable v. Bank of United States*, 2 Pet. 7; *P. T. R. Co. v. Stimpson*, 14 Pet. 448; *Massey v. Huntington*, 118 Ill. 80); and vested rights should not be overthrown upon any such declarations as are here alleged. They are too insufficient a foundation on which to sustain a charge of fraud or undue influence.

Here was a lady of eminent truthfulness and religious disposition; quite advanced in years, it is true, but conceded even by the complainants to have been in the full possession of all her mental faculties; a person even of vigorous intellect and independent will, and for her advanced years not unduly weak in body; and between whom and her two daughters, according to the great preponderance of the evi-

dence, the most kindly relations existed. In order to show that such a person was the victim of undue influence on the part of the daughters, with whom she made her home to the day of her death, some stronger evidence should be adduced than that which is presented in this record. Appropriate to the situation may be cited what the Supreme Court of the United States said in the case of *Mackall v. Mackall*, 135 U. S. 167:

"Influence gained by kindness and affection will not be regarded as *undue*, if no imposition or fraud be practiced, even though it induce the testator to make an unequal and unjust distribution of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made."

But it is needless to pursue the subject farther. It is clear to us that in dismissing the bill of complaint the court below was entirely right; and that, therefore, the decree of dismissal should be *affirmed, with costs. And it is so ordered.*

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## CHAPMAN

v.

## NATALIE ANTHRACITE COAL COMPANY.

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### AFFIDAVITS OF DEFENCE; SEVENTY-THIRD RULE.

1. While great strictness is not required of a defendant in his affidavit of defence under the 73d rule of the Supreme Court of the District, he can not be permitted to evade the rule by making vague and indirect statements in his affidavit, when it is evidently in his power to set forth his defence, if he has one, with the particularity which the rule contemplates.
2. An affidavit of defence considered and *held* insufficient on account of vagueness and indefiniteness.

No. 603. Submitted October 13, 1897. Decided November 1, 1897.

HEARING on an appeal by the defendant from a judgment under the 73d rule of the Supreme Court of the

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District of Columbia, for want of a sufficient affidavit of defence. *Affirmed.*

The facts are sufficiently stated in the opinion.

*Mr. Percival M. Brown* for the appellant.

*Mr. John C. Fay* and *Mr. Samuel A. Putman* for the appellee.

Mr. Justice MORRIS delivered the opinion of the Court:

This is an appeal from a judgment of the Supreme Court of the District of Columbia, rendered under the Seventy-third Rule of that court, providing for summary judgments in certain cases upon affidavit.

The appellee, the Natalie Anthracite Coal Company, filed its declaration in two counts—the first for an agreed balance of an account stated, amounting to \$106.21, claimed to be due and payable as of the date of January 5, 1897, but to have been settled on December 1, 1896; the second, on an open account for \$2,034.89, and including also the claim of the first count, \$2,141.10, for which an itemized bill of particulars was subjoined to the declaration. Annexed to the declaration was an affidavit, the sufficiency of which as a ground for summary judgment under the Seventy-third Rule in the absence of a good ground of defence, is not questioned.

The defendant, the appellant, James Edward Chapman, filed six several pleas, all of which amount to the general issue, with a claim of set-off and recoupment; and the pleas were supported by affidavit. The question of controversy is, whether these pleas and the supporting affidavit were sufficient under the requirements of the rule, and entitled the defendant to his trial by jury. Upon motion by the plaintiff for judgment, the court below held that they were not sufficient, and that they set up no good ground of defence, and accordingly gave judgment for the plaintiff. From this judgment the defendant has appealed.

The defendant's first and second pleas are merely the gen-

eral issue in the usual form, and need not here be considered.

The third plea is addressed to the first count of the plaintiff's declaration. It admits that there was an account stated between the parties, but gives the date as of December 20, instead of December 1, 1896, which is unimportant; and alleges that the balance due on this account was only \$50.60, instead of \$106.21, as claimed by the plaintiff. Whether because the defendant stated the amount correctly, or because the plaintiff acquiesced in the statement in order to end the controversy, it is not important to inquire; but the plaintiff accepted as correct the amount set forth in the plea; and the judgment below, so far as this item was concerned, was based upon the plea. This part of the claim, therefore, for the present purpose at least, is removed from the domain of controversy.

For defence to the residue of the plaintiff's claim, the defendant's remaining pleas set up the fact, that, on June 20, 1896, the parties entered into a verbal contract for the sale by the plaintiff to the defendant of three thousand tons of coal, more or less, which the defendant required in order to enable him to perform a contract between himself and the military authorities of the United States at the arsenal in the city of Washington, entered into on January 20, 1896; that the coal, which was to be free from slate, bone or other impurities, was to be shipped by the plaintiff within two weeks from the receipt of the defendant's order therefor, which period of two weeks was about the time required by the defendant to load the coal and deliver it at the arsenal; that, in the event of the failure of the plaintiff so to deliver good coal, the defendant reserved the right to annul the contract between himself and the plaintiff and to go into the open market to purchase the coal which he required and to charge the plaintiff with any loss thereby accruing to the defendant; that the plaintiff failed to perform the contract, failed to furnish pure coal, failed to furnish it on time, and

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finally failed to furnish it at all; that the defendant was thereupon compelled to go into the open market and to purchase the coal which he required, at a loss to himself of \$618.90, which he pleaded as a set-off to the plaintiff's demand; that, on account of the plaintiff's failure to perform its contract, the defendant was compelled to expend a sum of \$38.95 for cartage; that there was a shortage of five and one-half tons of coal, for which the plaintiff had agreed to allow to the defendant the sum of \$21; that both of these two last mentioned sums, aggregating \$59.95, had been agreed by the plaintiff to be allowed as a credit to the defendant; that he pleads this sum also of \$59.95 as a set-off to the plaintiff's claim; and finally, that, on account of the plaintiff's failure to deliver the coal promptly, as required, and on account of the bad character of the coal actually delivered, the defendant's business and reputation were damaged and he was placed in danger of being put in the light of a defaulting contractor, whereby he was injured to the extent of three thousand dollars, which he claims to be entitled to recoup from the plaintiff's demand.

Such are, in substance, the statements of the pleas set forth with much verbiage and unnecessary prolixity. The affidavit annexed simply adopts the statements contained in the pleas, and affirms their truth.

The plaintiff moved for judgment on the ground of the alleged insufficiency of the affidavit of defence; and upon that motion the court gave judgment for the plaintiff for the sum of \$2,085.49, which was the amount claimed in the declaration, less the difference in the balance of the account stated of December 1 or December 20, 1896, as set forth in the respective claims of the plaintiff and defendant, thereby disallowing all the claims of the defendant's fourth, fifth and sixth pleas. From this judgment the defendant has appealed.

It is very surprising that notwithstanding its great prolixity and numerous repetitions, the affidavit of defence, in

which, of course we consider the pleas to have been incorporated, is so greatly deficient in clearness and specific statement. It gives no data whatever to show when the contract between the defendant and the United States was to be performed, upon which, as it is alleged, depended to some extent the performance of the contract between the plaintiff and the defendant. It gives no data to show the alleged defaults of the plaintiff—no time, no amount, no specification of any kind, other than that the defendant was compelled to go into the open market to purchase coal at a loss to himself of \$618.90. It alleges impurity of the coal delivered, and that the defendant was at great expense to remove such impurity; but the amount of expense is nowhere stated. It is simply included in a gross arbitrary claim of \$3,000 for damages to business and reputation—which, it is very plain, we can not consider in this connection. While it is proper, as was said in the case of *Bailey v. District of Columbia*, 9 App. D. C. 360, and several other cases, that great strictness should not be required of a defendant in his affidavit, and that an affidavit will be held sufficient which shows a defence set forth in good faith, yet it can not be permitted that the defendant should evade the rule, which was intended to promote the speedy administration of justice, and should therefore receive a reasonable construction to effect that purpose, by the interposition of indirectness and vague statements, when it is evidently in his power to set forth his defence, if defence he has, with the particularity which the rule contemplates.

The fair inference from the defendant's statement is that the contract between him and the United States was to be performed, and was in fact performed before the beginning of the winter following the date of that contract (January 20, 1896). This conclusion is likewise justified by usage and by the requirements of law in regard to governmental contracts (Rev. Stat., Secs. 3679, 3732), which apparently would require the contract in question to be performed

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during the then current fiscal year; that is, before July 1, 1896. If this be so, and we see no reason to doubt it, it follows necessarily that all grounds of controversy between the parties to this suit with reference to the contract between themselves of June 20, 1896, must have entered into the settlement of their account stated of December 1 or December 20, 1896; and that the defendant's fourth, fifth and sixth pleas are merely a covert attempt to evade the force of that account stated. This we think should not be permitted. If, on the contrary, "the balance of old accounts," conceded to have been a statement of then existing accounts, did not include transactions under the contract of June 20, 1896, it was easy for the defendant so to state, and it was incumbent for him to do so, for he alone brings forward that contract. If the coal delivered by the plaintiff between December 1, 1896, and January 11, 1897, which constitutes the greater part of its claim, and which is specifically set forth in its bill of particulars, and which amounted to about 623½ tons, was delivered under the contract of June 20, 1896, it was easy for the defendant so to say. The fact that he did not say so, and that all the circumstances tend to show the contrary, justifies the inference that this was a new and distinct transaction. But whether it was or not, it is very evident that the defendant's affidavit is wanting in the definiteness and good faith, which should characterize an affidavit of defence. The case is one where every element of defence was clearly known and available to the defendant, if good ground of defence existed.

We think the court below was right in entering judgment for the plaintiff, and we are of opinion that the judgment should be *affirmed with costs*. *And it is so ordered.*

WELLS v. WELLS.

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## EQUITY PLEADING AND PRACTICE; DIVORCE; CUSTODY OF CHILDREN; JUDICIAL DISCRETION.

1. In a suit for a divorce, where a cross-bill is answered, it may be retained and made the basis of a decree although the original bill is dismissed.
2. And in such a case, although the cross-bill contains no prayer for the disposition of a child of the parties, a prayer to that effect contained in the original bill and repeated in the answer to the cross-bill, is sufficient, under Sec. 747, R. S. D. C., relating to the custody and maintenance of the child.
3. The power of a court of equity in divorce proceedings in respect of children of the parties, is incidental only to the principal subject-matter of the controversy; and no special allegation in the pleadings in relation to the children is required in order to justify the court to provide for their maintenance and support.
4. In such proceedings, in determining to which of the parties the custody of a child will be awarded, the best interest of the child will be considered as paramount.
5. The matter of the award of the custody of a child or children, in such cases, is one almost exclusively of judicial discretion, which will never be reviewed on appeal except when manifestly abused.

No. 704. Submitted October 19, 1897. Decided November 1, 1897.

HEARING on an appeal by the defendant from that part of a decree in a divorce suit, relating to the custody of a child of the parties. *Affirmed.*

*Mr. Arthur A. Birney* for the appellant.

*Messrs. Flora & Rupli* and *Mr. Edward L. Gies* for the appellee.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

The appellee, Mrs. Louise C. Wells, filed her bill for divorce from her husband, the appellant, Fenton G. Wells, on the

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16th of January, 1897, upon the alleged ground of desertion and failure, on the part of her husband, to furnish maintenance for herself and child; and she prayed for alimony and the custody of her child, a boy some three years and a few months old. The appellant, the husband, answered the bill, denying the charge of desertion and failure to supply means of support to his wife and child, and averred that the wife was then engaged as a clerk in a store in the city of Baltimore, and was earning a comfortable living for herself and child.

The appellant then filed a cross-bill, alleging that his wife, the original complainant, had deserted him, and he alleged that the appellee, his wife, was then and had been for nearly a year then past engaged in the millinery business in the city of Baltimore, and received therefrom a sufficient income to support herself and child. To this cross-bill the appellee filed an answer, denying the material facts charged, and in the answer she averred that she was without means of support for herself and child, and she prayed that the court would award her permanent alimony for their support, *as prayed for in her original bill*. There was proof taken, though it is not contained in the transcript of the record before us; and on the 11th of May, 1897, the court passed a decree dismissing the original bill filed by the wife, but, upon the cross-bill of the husband, the court decreed an absolute divorce of the parties, upon the ground of the "willful desertion and abandonment of the said Fenton G. Wells by the said Louise C. Wells for the full and uninterrupted space of two years prior to the filing of the bill of complaint and cross-bill." And it was further decreed, "that the child, referred to in the pleadings, shall, *until the further order of the court*, remain in the custody of Louise C. Wells, the mother, and the said Fenton G. Wells *be charged with its maintenance*, for which purpose he shall, *until the further order of this court*, pay to said Louise C. Wells the monthly sum of ten dollars, the first payment to be made June 1st, 1897."

From that part of the decree awarding the custody of the child to the mother, and directing alimony to be paid for its support, the husband has appealed.

The cross-bill having been answered by the wife, that bill could be retained and made the basis of a decree for divorce in favor of the husband, notwithstanding the original bill by the wife was dismissed. *Owen v. Owen*, 54 Ga. 526-7; *Musselman v. Musselman*, 44 Ind. 106. And though the cross-bill contained no prayer for the disposition of the child, yet the prayer contained in the original bill of the wife, and referred to and repeated in her answer to the cross-bill, is quite sufficient for the action of the court, under Section 747, of the Revised Statutes of the District of Columbia, which provides that, "The court shall also have power to order and direct, in every case of divorce, who shall have the guardianship and custody of the children of the marriage of the parties divorced, and who shall be charged with their maintenance."

No special allegation in the pleading in relation to the children, is required, as seems to be supposed by counsel for the appellant, in order to justify the court to provide for the custody and maintenance of the children of the marriage dissolved. All that is necessary to justify the court in acting in respect to the children is, that their situation and circumstances be brought to its attention. This power of the court in respect to the children of the marriage is incidental only to the principal subject-matter of controversy; and it becomes the duty of the court to act, whether the parents make special application for the custody and maintenance of the children or not.

This is well exemplified in a New Jersey case, of *Snover v. Snover*, 10 N. J. Eq. 261. In that case a bill was filed by the wife against her husband for a divorce *a mensa et thoro*, and for alimony, and the relief was granted. The bill contained no prayer in relation to the children of the marriage, and the defendant's counsel objected to any inter-

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ference with them by the court; but provision, notwithstanding, was made for their care and custody in the decree. The court, in disposing of the objection, said:

"It is true the bill does not pray any decree in reference to their provision or disposition. But their situation is before us, and the decree to be made in this case respecting the parents affects their welfare. It is the duty of the court to protect such of them as require its care."

There can be no doubt or question of the power and jurisdiction of the court below to pass the parts of the decree appealed from. In all such cases, where there has been a decree dissolving the marriage absolutely or only partially, the courts, looking *principally* to the welfare and happiness of the children, will award their care and custody to the one party or the other as will best promote their interest and general welfare. And acting on that principle, no certain fixed rule for the government of the courts in all cases can be laid down, other than this, that the best interest of the children must be consulted as paramount. It has been repeatedly declared in such cases, that the courts do not act to enforce the rights of either parent, but to protect the interest and general welfare of the children. 2 Bish. Mar. & Div., Sec. 532 and cases cited; *Barrere v. Barrere*, 4 John. Ch. 187; *Goodrich v. Goodrich*, 44 Ala. 670; *Prather v. Prather*, 4 Desaus. 33, 44. Indeed, the entire matter of the award of the custody of the child or children, and their maintenance, in such case as the present, is one largely, and it may be said almost exclusively, of judicial discretion, and that discretion is never reviewed by an appellate court, except when such discretion has been manifestly abused. *Waring v. Waring*, 53 N. Y. 570; *Graft v. Graft*, 76 Ind. 136; *Cowes v. Cowes*, 8 Ill. 435, 440.

There is nothing shown in the present record to call for a review of that part of the decree appealed from, and it must therefore be affirmed.

*Decree affirmed.*

THE WASHINGTON AND GEORGETOWN RAILROAD  
COMPANY.

v.

ADAMS.

## PLEADING AND PRACTICE; PREPONDERANCE OF TESTIMONY.

1. Where after an appeal in a personal injury case from a judgment for the defendant on a verdict directed by the court at the close of the plaintiff's testimony, on which appeal the judgment is reversed on the ground that a *prima facie* case of negligence on the part of the defendant had been made out, a second trial is had upon the same evidence for the plaintiff and evidence adduced by the defendant of a contradictory character, and also alleged to show contributory negligence, a judgment on a verdict for the plaintiff will not be disturbed on an appeal by the defendant.
2. The question of the preponderance of the testimony is always one for the jury, subject to the wise discretion of the trial court to set aside its verdict, not reviewable on appeal.

No. 715. Submitted October 21, 1897. Decided November 1, 1897.

HEARING on an appeal by the defendant from a judgment on verdict in an action to recover damages for personal injuries. *Affirmed.*

The facts are sufficiently stated in the opinion.

*Mr. Enoch Totten, Mr. J. S. Flannery and Mr. W. D. Davidge* for the appellant.

*Mr. C. Maurice Smith and Mr. Edwin Forrest* for the appellee.

Mr. Justice MORRIS delivered the opinion of the Court:

This is a suit for damages for personal injuries alleged to have been sustained by the appellee, Frank C. Adams, by being thrown from a car of the appellant, The Washington

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and Georgetown Railroad Company, in consequence, as it is claimed, of the negligence of the agents or employees of the company; and this is the second appeal in the case. On the former appeal (9 App. D. C. 26) we held that it was error to direct a verdict for the defendant upon the plaintiff's own testimony as then adduced, which was the ruling of the trial court made upon defendant's motion at the conclusion of the plaintiff's testimony; and we accordingly reversed the judgment, and remanded the cause for a new trial. That new trial has now been had, and has resulted in a verdict and judgment for the plaintiff for \$3,500; and from this judgment the defendant has appealed.

It appears from the record, and it seems to be conceded, that the testimony adduced on behalf of the plaintiff at this second trial was substantially the same as at the first trial, upon which we held that he was entitled to go to the jury. The defendant on its part adduced testimony deemed by it to be sufficient to overcome the plaintiff's testimony, and vastly to preponderate over it. And accordingly, at the conclusion of the whole testimony, the same request was made as on the former trial for an instruction to the jury to render a verdict for the defendant. The request was denied; and the defendant excepted; and upon that exception the present appeal is based. There were other rulings of the trial court, and other exceptions thereto, but they are not assigned here as error, and are not therefore to be here considered.

It is quite clear that this appeal can not be sustained. If, as we have held, the plaintiff in and by his testimony made a *prima facie* case upon which he was entitled to go to the jury, no assumed preponderance of testimony could deprive him of that right. The question of preponderance of testimony is always one for the jury, subject to the wise discretion of the trial court to set aside its verdict not reviewable on appeal. It was upon the assumption of the preponderance of evidence in favor of the defendant, and also upon

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the alleged contributory negligence of the plaintiff claimed to have been shown by that evidence, that the instruction requested was based. But the sufficiency in law of the plaintiff's testimony we have already determined; and the facts claimed to constitute contributory negligence are controverted. Under our ruling on the former appeal the case was clearly one for the jury, and there was no error in submitting it to them. *Phoenix Ins. Co. v. Doster*, 106 U. S. 30; *Railroad Co. v. Powers*, 149 U. S. 43; *Warthen v. Hammond*, 5 App. D. C. 167; *District of Columbia v. Gray*, 6 App. D. C. 314; *Warner v. Railroad Co.*, 7 App. D. C. 79.

It follows, therefore, that the judgment of the court below should be *affirmed, with costs. And it is so ordered.*

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## THE DISTRICT OF COLUMBIA v. KRAUSE.

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### STATUTE OF LIMITATIONS; ADVERSE POSSESSION; SEVENTH STREET ROAD; ROCKVILLE AND WASHINGTON TURNPIKE COMPANY.

1. Whether the statute of limitations will run against the District of Columbia in favor of a claimant by adverse possession of a portion of a public highway outside the boundary of the city of Washington, *quaere*.
2. The acts of congress of March 31, 1871, authorizing the municipal authorities of this District to take the property and franchises of the Rockville and Washington Turnpike Company and convert the Seventh street road into a public highway, and the act of the Legislative Assembly of the District of August 9, 1871, appropriating a sum of money for payment of damages to the ap-Turnpike Company, can not, of themselves, be held to work a conveyance of the title of the road to the District, especially in the absence of any proof of payment of the money so appropriated.
3. There is nothing in the language of the acts of incorporation and the grants of the franchises of the Rockville and Washington

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Turnpike Company, to prevent the running of the statute of limitations against that company in favor of a claimant by adverse possession to a portion of the Seventh street road between the boundary of the city of Washington and the boundary of the District of Columbia.

No. 683. Submitted October 8, 1897. Decided November 2, 1897.

Hearing on an appeal by the District of Columbia from a judgment on verdict in an action of trespass *quare clausum fregit*. *Affirmed*.

The facts are sufficiently stated in the opinion.

*Mr. S. T. Thomas*, Attorney of the District of Columbia, and *Mr. A. B. Duval*, Assistant Attorney, for the appellant.

*Mr. Charles A. Keigwin* for the appellee.

Mr. Justice SHEPARD delivered the opinion of the Court:

The judgment appealed from was recovered by the appellee, Margaret Krause, against the District of Columbia, in an action of trespass for an invasion of her premises and damages done to the property. Plaintiff owned and was in possession of the land fronting ninety-six feet upon what is called the Seventh street road, between the boundary of city of Washington and the boundary of the District of Columbia, under a title describing the same as abutting on said road. In September, 1893, the agents of the District removed the plaintiff's fence from the line claimed by her and dug away the soil, for a few feet, adjacent to her house, in the execution of a plan for widening and improving the highway. Plaintiff's right to recover damages was made to turn upon the question of her title by adverse possession of the strip of land upon which the entry was made.

The following is a substantial statement of the title claimed by the District of Columbia:

April 20, 1810, Congress authorized the organization of a corporation to build, and collect tolls on, a turnpike road from the city boundary to that of the District in the direc-

tion of Baltimore. Authority was given, under a form of procedure provided in the act, to acquire by condemnation and to lay out by metes and bounds a roadway not less than sixty-six feet wide, along which was to be constructed, of rock or gravel, a road not less than twenty-four feet wide. 2 Stat. 570.

No organization was had under this act. In August, 1817, the Legislature of Maryland incorporated the Rockville and Washington Turnpike Company, and empowered it to construct and operate a turnpike road from Rockville, Maryland, to the boundary of the District, in order to establish communication with Washington. This corporation was authorized to acquire a roadway sixty-six feet in width. On February 15, 1819, Congress passed an act reciting the Maryland incorporation act, and concluding that the same "be and is hereby declared to be in full force within the District of Columbia." The building of the road from the District line to the city boundary, in continuation of the road from Rockville, was expressly authorized. The third section of the act invests the said company with all the rights, privileges, and so forth, of the grant of 1810, and declares the same subject to all the obligations imposed by that act. 3 Stat. 482.

A question was raised on the argument as to whether the Maryland act authorized the acquisition of the land required for the road in fee or as an easement merely. This we need not occupy time in discussing, as it cuts no figure in the case presented in the record, as we view it. It may become a question of importance in some other case, in respect of the claim by the District of title in fee simple to a strip of land ninety feet wide, or less, occupied by the said Seventh street road, and will therefore be postponed for decision until such a case may be presented.

The District offered in evidence a copy from the record of deeds under date of July 19, 1819, a document signed by two commissioners and certified to by a surveyor, re-

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porting to the circuit court that a roadway ninety feet wide had been condemned and laid off, according to an accompanying plat, for the occupation of the Rockville and Washington Turnpike Company along the course heretofore mentioned. The record showed an indorsement upon said instrument as follows: "Accepted and ordered to be recorded." (Signed) "William Brant, Clk." There is nothing else to show an approval of the report which was signed by only two commissioners, when three were required by the act. The only attempt to prove a search for the original showed that the same went back no later than the records of the year 1863. Whether the preliminary proof was sufficient to authorize the admission of the record, as well as whether the report was fatally defective because of the failure of the third commissioner to take part in the proceedings (both of which objections were made by the plaintiff at the time of offer), are questions that may also be passed without decision now. They do not necessarily arise. It may be remarked, however, that if there are other cases pending in the trial court in which that document is important, prudence would dictate a diligent search of the records of the proper date for the original report and such other proceedings, if any, as may have been had in connection therewith.

The proof seems to show that the line of roadway actually laid out and claimed by the Turnpike Company varied from sixty to sixty-six feet in width; which last is the maximum width authorized by the Maryland act. Whether the right of the corporation to acquire land must be regarded as measured by the limitations of the Maryland incorporation act, which was adopted by Congress, or by the grant of the act of 1810, and the permission given to succeed thereto, is another question that need not now be decided.

The testimony of defendant's own witness, the surveyor who laid out the lines for the improvement of the highway in September, 1893, shows that from 1851 to 1893 the road

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was generally not more than sixty feet wide, as marked by the fences on and near the plaintiff's land.

Congress, by another act, passed March 3, 1871, authorized the municipal authorities of the District to take the property and franchises of the Turnpike Company and convert the road into a free public highway. 16 Stat. 586.

An act of the Legislative Assembly of the District, passed August 9, 1871, was read in evidence, and showed an appropriation of the sum of \$14,277.48 for the payment of damages to the Turnpike Company in order to give effect to the act of Congress. No evidence was offered to show a condemnation of the Turnpike Company's property, or its purchase and conveyance, or even the payment to any person of the money so appropriated.

It appears, however, that in 1872, the District authorities went upon the highway and widened it throughout its length to sixty-six feet; and in so doing moved the fence of the plaintiff a few feet within the line it had formerly occupied. This fence remained in the new location continuously from that time until the entry and removal made in September, 1893. Plaintiff's husband acquired the property by deed and for valuable consideration in 1866, and since that time plaintiff has been in possession and occupation of the land and the house thereon, claiming title to the line occupied by her said fence. The deeds under which she claims describe the land as abutting on said road.

The court instructed the jury to find for the plaintiff if her adverse possession had continued for more than twenty years before the entry made in September, 1893. This charge contains all the requisites necessary to such title, and is not excepted to for substantial error. The very interesting and important question that has been argued by defendant, in respect of the running of the statute of limitations against the District of Columbia in the matter of adverse possession of a public highway, outside the bound-

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ary of the city of Washington, does not arise under the facts set forth in this record, by which alone the soundness of the charge must be tested.

Appellant assumes, in the first place, that there had not been sufficient proof of adverse possession for twenty years before the time when the Board of Public Works entered and improved the road in 1872. The evidence is not clear on that point, but it is unimportant, because the charge of the court did not set that as a limit. On the other hand, the time within which the bar might become fixed, was extended to 1893. In the second place, it is assumed, and this foundation is absolutely necessary to the maintenance of the proposition, that the District actually acquired title to the lands of the Turnpike Company before plaintiff's title could have ripened through adverse possession; and that, by virtue of the rule of law contended for, a stop was put to the further running of the statute, although the adverse possession of plaintiff was permitted until September, 1893. As we have seen, however, there was no foundation for the operation of this rule of law laid in the evidence. There was no proof whatever offered to show this acquisition of title. If the District had a conveyance or transfer it failed to produce it. Surely the act of Congress merely authorizing the acquisition, and the act of the District Assembly appropriating money to pay damages, could not of themselves work a conveyance of the title, especially in the absence of any proof of payment of the money so appropriated.

The real question presented by the record, then resolves itself into this: Did the statute of limitations run against the private corporation? We think that there is nothing in the language of the acts of incorporation and the grants of the franchises that would take this case out of the rule that applies in all such cases. The charge of the court was clearly right under the evidence in the case, and the verdict followed as a matter of course. The judgment must, therefore, be affirmed, with costs.

*Affirmed.*

## PERRY v. SWEENY.

## ORPHANS' COURT; PROBATE OF WILL OF PERSONALTY AND REALTY, EFFECT OF; EJECTMENT.

An order of the Orphans' Court of this District admitting a will of personalty and realty to probate after a trial by jury of contested issues certified to the Circuit Court, is not conclusive as to the realty when offered in evidence by the devisees, in a subsequent action of ejectment between the same parties; the Orphans' Court having no jurisdiction over the devise of real property.

No. 718. Submitted October 8, 1897. Decided November 4, 1897.

HEARING on an appeal from an interlocutory order (leave to appeal having been specially allowed) sustaining a demurrer to a plea of *res judicata* in an action of ejectment. *Affirmed.*

The COURT in its opinion stated the case as follows:

This is an appeal from an interlocutory order of the Supreme Court of the District, in an action of ejectment, allowed by order of this court under the authority conferred by Section 7 of the act establishing the Court of Appeals and defining its jurisdiction.

The appellee, Mary E. Sweeny, as plaintiff below, brought the suit to recover certain parcels of land in the city of Washington, claiming title thereto as heir-at-law of Michael Crane, deceased.

The defendants, R. Ross Perry and The National Safe Deposit, Savings and Trust Company of the District of Columbia, entered a special plea in bar alleging the following in substance: That Michael Crane died leaving a will, duly executed, wherein, after appointing defendants his executors, he devised to them, in fee simple, the lands sued for. That the will was by them regularly offered for probate in the

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Supreme Court holding a special term for Orphans' Court business. That plaintiff filed a *caveat* therein denying the execution of the said will, and charging that the testator was of unsound mind, and had been unduly influenced, and so forth. That plaintiff then prayed the said court to direct issues, embodying the said grounds of contest, to be sent to the special term holding the sessions of the Circuit Court for trial by a jury. That the issues were so transmitted, and the trial had thereof resulted in a verdict, upon each one, in favor of the defendants, which having been duly certified to the special term holding the Orphans' Court, that court entered a decree admitting the will to probate in solemn form. That said decree remains in full force, and is conclusive of the validity of the will and the title of defendants thereunder.

To this plea the court sustained the plaintiff's demurrer; and the appeal is from that order.

*Messrs. R. Ross Perry & Son* for the appellants:

1. Under the provisions of the Seventh Amendment of the Constitution, where parties litigant have raised a certain issue in a court competent to decide that issue, and have had that issue tried in a common-law court of record, before a common-law jury, under the instruction and control of a judge of that court, neither of them can again litigate that question, save according to the course of the common law.

The meaning of the controlling words of this amendment has been determined by sundry decisions of the Supreme Court to refer to suits at common law. *Parsons v. Bedford*, 3 Pet. 446; *Justices v. Murray*, 9 Wall. 227; *Railroad v. Chicago*, 166 U. S. 226; *Weston v. Charleston*, 2 Pet. 464; *Upshur County v. Rich*, 135 U. S. 467; *Ormsby v. Webb*, 134 U. S. 147; *Campbell v. Porter*, 162 U. S. 478.

These authorities establish that this proceeding is a suit at common law. And if so, then the conclusion must follow

that the facts found by the verdict of the jury in this case can not be re-examined in the Supreme Court of the District of Columbia, which is unquestionably a court of the United States, save in accordance with the rules of the common law. *Van Ness v. Van Ness*, 6 How. 62.

2. Where certain issues are raised with respect to the validity of a will which includes realty as well as personalty, and the finding of a jury is had upon these issues, and the judgment of the court entered thereupon, such judgment is a judgment *in rem*, and is binding upon all the world. In the first place, it is to be noted than when an issue is once granted the functions of the Orphans' Court, so far as that question is concerned, are suspended until the finding of the jury be certified, and when that is done the court has no discretion, but is imperatively required to enter up judgment in conformity thereto. Where, on the application of one party, an issue is transmitted to a court of law for trial, the granting, on the application of another party, of substantially the same issue, to be tried before another jury, is not allowed. The Orphans' Court is bound to consider all testimony aduced before it on the same subject which is not inconsistent with the finding of the jury; but so far as the facts covered by the verdict are involved, they are settled unalterably by it, and all other facts contrariwise are to be ignored. *Pegg v. Warford*, 4 Md. 385; *Warford v. Van Sickle*, 4 Md. 397; *Peters' administrator v. Peters*, 20 Md. 178; *Cecil v. Cecil*, 19 Md. 72; *Browne v. Browne*, 22 Md. 103; *Worthington v. Giddings*, 56 Md. 542, 549; *Van Ness v. Van Ness*, 6 How. 68; *Jones v. Hodges*, 62 Md. 525.

2. As to the effect of the judgment of the court admitting a will to probate and record with respect to issues that were not raised, the decisions of the Supreme Court in the following cases are conclusive: *Cromwell v. County of Sac*, 94 U.S. 351; *Davis v. Brown*, 94 U.S. 423. The judgment of the court is to operate as an estoppel not only upon the questions that were actually raised, but also upon those that

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might have been raised wherever the question is concerning the exact subject-matter. The plaintiff in this case was the caveator in the proceedings before the Orphans' Court. The issues which she raised there were the same issues which she raises here. Any other issues which she might raise here, she could have raised there. So that, on elementary principles of law, the plaintiff here is estopped from raising any question whatever, about the validity of this instrument, which she could have raised when this very question was the one in issue.

3. The Maryland cases bearing upon the particular question, which, of course, do not take into consideration the constitutional amendment, are the following: *Warford v. Colvin*, 14 Md. 532; *Cheveront v. Textor*, 53 Md. 295; *Jones v. Hodges*, 62 Md. 525.

*Mr. J. Altheus Johnson*, *Mr. Charles A. Keigwin* and *Mr. Mr. J. M. Wilson* for the appellee:

1. The Orphans' Court of the District of Columbia is utterly without jurisdiction to take probate of wills as an instrument of title to real estate. This proposition is not open to question, but is effectually settled by the Supreme Court of the United States. *Robertson v. Pickrell*, 109 U. S. 608; *Campbell v. Porter*, 162 U. S. 478.

2. That the proceedings of an Orphans' Court, when it is without jurisdiction to take probate of wills of real estate, have no effect whatever upon the will as a muniment of title to land left by the decedent, even as between the parties to the proceedings, is supported and also illustrated by the following cases: *Den v. Ayres*, 13 N. J. L. 153; *Smith v. Bonsall*, 5 Rawle, 80; *Rowland v. Evans*, 5 Pa. St. 435; *Bogardus v. Clarke*, 1 Edw. Ch. 266; *Bowen v. Sweeney*, 89 Hun, 359; *Warford v. Colvin*, 14 Md. 534; *Crosland v. Murdock*, 4 McCord, 217.

The principles that the cases above cited apply were long ago recognized as well established at the common law.

*Hume v. Burton*, 1 Ridgway P. C. 277; *Montgomery v. Clark*, 2 Atk. Ch. 379; *Dawson v. Choter*, 9 Mod. 90.

The Maryland act of 1798, which is the statute that determines the jurisdiction in this District of the Orphans' Court, and likewise the effect of probate, was expressly considered by the Supreme Court of the United States in the case of *Darby v. Mayer*, 10 Wheaton, 465, 470; and the court held in the ejectment proceedings then before it that a decree of probate under that act did not in anywise establish or affect the will as an instrument of title to land in Maryland, declaring that such a decree was not "evidence in a land cause in the courts of that State."

Mr. Justice SHEPARD delivered the opinion of the Court:

1. The question presented for decision is this: Whether, after a contest and in pursuance of the verdict of a jury found upon issues duly certified to the Circuit Court, a will shall have been admitted to probate in the special term for Orphan's Court business, the decree thereof shall be held to be conclusive in an action of ejectment between the same parties, wherein the said will is offered as evidence of title by the devisees?

From a very early day in England, the ecclesiastical courts had exclusive jurisdiction over wills of personalty; but there was no such thing as the probate of a devise of real estate. Such a will was always open to dispute when offered in an action of ejectment as evidence of title.

Where a will had been admitted to probate before the ordinary because it passed personal estate as well as realty, that probate did not make it even *prima facie* evidence of title to land, and it was required to be proved, and was subject to attack in an action of ejectment in the same manner as a deed or other conveyance of title. "We all know," said Mr. Justice Story, "that in England the distinction has been constantly maintained that the probate of a will by the proper ecclesiastical court is conclusive as to personalty,

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but that it is not evidence as to real estate. The reason is that the ecclesiastical courts have no jurisdiction whatsoever except over wills of personal estate, and therefore the probate thereof, by the sentence or decree of those courts, is wholly inoperative and void except as to personal estate. The validity of wills of real estate is solely cognizable by courts of common law, in the ordinary form of suit; and the verdict of the jury in such suits and the judgment thereon, are, by the very theory of the law, conclusive only as between the parties to the suit and their privies." *Tompkins v. Tompkins*, 1 Story C. C. 547, 552. In that case, it is true, the probate was held to be conclusive because of the change of rule made by the statute of the State of Rhode Island, under which the case arose.

The rule, above stated, prevailed in the States of the Union receiving and adopting the common law, until such time as their special tribunals of probate jurisdiction were expressly empowered to admit wills to probate for all purposes. *Harrison v. Roman*, 3 Wash. C. C. 580, 582; *Smith v. Bonsall*, 5 Rawle, 80, 83; *Rowland v. Evans*, 6 Pa. St. 435, 440; *Crosland v. Murdock*, 2 McCord, 217; *Bogardus v. Clark*, 1 Edw. Ch. 266; S. C. 4 Paige Ch. 623, 626; *Den v. Ayres*, 13 N. J. L. 153; *Parker v. Parker*, 11 Cush. 525; *Ballow v. Hudson*, 13 Gratt. 676.

Considering the prevalence of that salutary rule of the common law, and of all enlightened systems of jurisprudence, that a thing once solemnly adjudicated in a court having jurisdiction of the case, shall not again be open to litigation between the same parties and their privies, the peculiar jurisdiction of the ecclesiastical courts in England, and their successors in this country, produced this anomalous condition: that a will disposing of both personal and real property might be sustained in the court of probate and made conclusive in respect of the personalty, and yet be subsequently set aside in a court of common law, so far as the real estate is concerned, upon the very issue of ca-

capacity that had been adjudicated in the former. It is the logical result, however, of the condition that each court had a jurisdiction which was entirely exclusive of the other in respect of the separate and distinct interests affected by the same will.

In 1785 Lord Chief Baron Yelverton, referring to this situation, said: "I believe no two acts can be supposed to be more intimately connected with each other, both in unity of time and of assurance, than a will of real and personal estate, written upon one and the same piece of paper or parchment, and subscribed by one and the same signature. And yet it is clear law that, though the probate of such a will is conclusive evidence of the sanity of the testator to make such a will, yet it is by no means conclusive evidence of his capacity to dispose of his real estate. And why? Evidently because the capacity of the party to do the two acts is triable by different jurisdictions. . . . From all which I am warranted to lay it down as a general position, that the capacity of a party to do one act is not conclusive of his capacity to do another, if his capacity as to that other be triable by a different jurisdiction, whether the two acts make one and the same assurance or are done at one and the same time or not." *Hume v. Burton*, 1 Ridgeway P. C. 277.

Nearly half a century before (A. D. 1742), Lord Chancellor Hardwicke had denounced this frequent result of a divided and independent jurisdiction as a "very great absurdity." He said, among other things: "I wish gentlemen of ability would take this inconvenience and absurdity into their consideration, and find out a proper remedy by the assistance of the legislature." *Montgomery v. Clark*, 2 Atkyns, 379. The invocation of the Lord Chancellor remained unheeded in England until 1857; and to this date, though reinforced by the example of the States generally, if not universally, has had no effect upon legislation for the District of Columbia.

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This was the state of the law when Maryland, in 1798, enacted the general statute relating to the jurisdiction of the Orphans' Court, that, with immaterial changes, is the law of the District of Columbia to-day. The regular Orphans' Court, continuing as it had been received from Maryland at the cession of the District, was abolished by act of Congress in 1870, but its powers were required to be exercised by a justice of the Supreme Court of the District, holding a special term for the purpose; and it was expressly declared that "all laws and parts of laws relating to said Orphans' Court, so far as they are applicable to said Supreme Court, are hereby continued in force." 16 Stat. 161; Compiled Stat. D. C. 300, Secs. 47, 48.

The act confers jurisdiction over the probate of wills of personalty, and requires them to be probated, and no mention is made of wills of real property. To make emphatic the limited nature of the powers of the Orphans' Court it is declared that: "The said Orphans' Court shall not, under pretext of incidental power or constructive authority, exercise any jurisdiction not expressly given by this act or some other law." Chap. 101, Subch. 15, Sec. 10.

The act was changed in Maryland, in some important particulars, and there is but one decision bearing directly on this point by the Court of Appeals of that State. There it was held that the existence and validity of a will, in so far as it disposed of real estate, are not proved by the record of the probate in the Orphans' Court, but are open for trial in an action of ejectment, notwithstanding the decree of that court. *Massey v. Massey*, 4 H. & J. 141, 145, 148. And see *Walford v. Colvin*, 14 Md. 532; *Jones v. Hodges*, 62 Md. 525.

The statute came before the Supreme Court of the United States quite early, and it was held that the jurisdiction affected the title of personalty only. *Darby v. Mayer*, 10 Wheat. 465, 470. Many years after, in a case arising in the District of Columbia, the same court said: "By the law of Maryland, which governs in the District of Columbia,

wills, so far as real property is concerned, are not admitted to probate. The common law rule prevails on that subject. The Orphans' Court there may, it is true, take the probate of wills, though they affect lands, provided they affect chattels also, but the probate is evidence of the validity of the will only so far as the personal property is concerned. As an instrument conveying real property the probate is not evidence of its execution. That must be shown by the production of the instrument itself and proof by the subscribing witnesses, or, if they be not living, by proof of their handwriting." *Robertson v. Pickrell*, 109 U. S. 608, 610.

This court was of the opinion in *Barbour v. Moore*, 4 App. D. C. 535, 545, that the act of Congress of July 9, 1888 (26 Stat. 246), had the effect to make the probate of a will in the Orphans' Court, disposing of both personal and real property, *prima facie* evidence of its contents and execution. But this view of the effect of that act has since been denied by the Supreme Court of the United States. *Campbell v. Porter*, 162 U. S. 478, 489. In the opinion in that case Mr. Justice Gray reviews the legislation of Maryland and the District, and the cases arising thereunder, and says, "Neither the Supreme Court of the District of Columbia, nor its predecessor, the Orphans' Court, had any jurisdiction to admit to probate a will of real estate only; and consequently, no record in any court of the District of a probate of a will would be any evidence of title to real estate."

Those decisions ought to be regarded as decisive of the entire question, as here presented, without further discussion. But as the question is one of importance, we think it proper to consider a contention, on behalf of appellants, which, conceding the want of probative virtue to the mere decree of the Orphans' Court admitting a will to probate that disposes both of personal and real property, so far as the latter is concerned, strenuously asserts that a different rule must apply, in a case like this, where the will has been established by the verdict of a jury in a court of common

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law upon issues joined between the same parties. As we have seen from the substance of the special plea set forth above, the appellee came voluntarily into the Orphans' Court, filed her *caveat*, presented all the issues that could be raised in respect of the validity of the will, and procured their transmission to the Circuit Court for trial by jury. The verdict having gone against her on every issue, it is argued that the facts so found can not be "otherwise re-examined in any court of the United States than according to the rules of the common law," as is declared in the Seventh Amendment; and that unless the decree, giving effect to that verdict, shall be declared conclusive as between the same parties, the practical effect will be the re-examination of the verdict in disregard of the rule of the common law and in violation of the constitutional prohibition.

What constitutes a common law jury, and the effect of verdicts in courts of special jurisdiction in the District of Columbia, were discussed at length by this court in the cases of *United States, ex rel. Brightwood Railway Co., v. O'Neal*, and *Hof v. Capital Traction Co.*, 10 App. D. C. 205, and need not be considered here, for they are beside the question. Nor, for like reason, need the question be discussed in the light of the views expressed by the Supreme Court of the United States in respect of the right and the process of review in that court of decrees of the special term for Orphans' Court business, admitting a will to probate after contest and trial by jury. Suffice it to say, that it is settled that the controversy over the probate of a will is such a "case" as may be reviewed in that court, and that it must be carried there upon a writ of error; for not being a "case in equity," strictly, it could not be taken up by appeal. This is all that was decided in *Ormsby v. Webb*, 134 U. S. 47, 60, 65. See also *Campbell v. Porter*, 162 U. S. 478, 481; *Ellis v. Davis*, 109 U. S. 485, 497.

Had the judgment or decree of the Orphans' Court admitting this will to probate been taken for review in an appel-

late court, the verdict upon which it was founded would have been regarded as conclusive of the facts involved. But whilst the verdict would stand, in such case, upon the same footing as any other verdict in a common law court, it does not follow that the decree or judgment rendered thereon by the Orphans' Court, must have the conclusive effect, on all points involved, of a judgment of a court of general jurisdiction, or of that of the Orphans' Court itself, in so far as the personal estate shall be concerned.

The statute makes it the imperative duty of the justice holding the special term for Orphans' Court business, in all contested cases of probate, to transmit the issues, upon demand of either party, to the special term for the Circuit Court, for trial by jury; and the verdict therein found, when duly certified to the Orphans' Court, must be given effect by appropriate decree, that court having no power to set it aside or ignore it. Act of 1798, Ch. 101, Subch. 15, Sec. 17; Compiled Stat. D. C. 302, Sec. 55; *Price v. Taylor*, 21 Md. 363; *Pigg v. Warford*, 4 Md. 385, 394; *Warford v. Van Sickles*, 4 Md. 397; *Van Ness v. Van Ness*, 6 How. 62, 67.

No judgment is, or can be, rendered upon the verdict in the Circuit Court. *Van Ness v. Van Ness*, *supra*, p. 68. Not even a judgment of the costs of the trial can be given. *Hubbard v. Barcus*, 38 Md. 166, 174.

The duty and power of that court are fully exercised and exhausted by the trial of the issues so transmitted and the return of the verdict, duly certified, to the Orphans' Court. In the latter court the decree or judgment is passed and entered, and from it alone the appeal lies to this court, and through this court, the writ of error from the Supreme Court of the United States. *Olmstead v. Webb*, 5 App. D. C. 38, 44; *Ormsby v. Webb*, 134 U. S. 47.

The order admitting the will to probate, then, being in no sense the judgment of the Circuit Court, the operation of the verdict, through the order or decree giving it effect, must be regarded as limited by the jurisdiction of the Or-

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phans' Court, which could extend no further than to establish the validity of the will in so far as it affected the disposition and title of personal property. If the decree had undertaken, by express recital, to go beyond this, it could have no binding effect whatsoever, because of this want of jurisdiction.

Again, the Circuit Court, acting merely in aid of the Orphans' Court in the determination of the issues requested to be tried by its jury, can only be regarded as exercising, *pro hac vice*, the jurisdiction of the Orphans' Court, and in consequence, the verdict ought to have the same effect and operation, and no more, as would be given to a verdict of a jury empaneled in the Orphans' Court itself, had it been so authorized by law.

This principle is applied in Maryland in the case of an appeal from the Orphans' Court to a court of general common law jurisdiction. *State, use of Stephenson v. Reigart*, 1 Gill, 1, 29; *Warford v. Colvin*, 14 Md. 556; *Frisby v. Parkhurst*, 29 Md. 58, 67. And the same result has been declared where the trial on appeal is *de novo* and by jury. *Crosland v. Murdock*, 4 McCord, 217.

In considering the effect of the verdict in this case, it must not be forgotten that the conclusiveness of a judgment or decree of a court of competent jurisdiction, where the parties and issues are the same, does not depend in any measure upon a trial by jury; and that a final judgment at law upon a demurrer to a declaration, or the findings of fact by the court where a jury has been waived, as well as a decree in equity, are as efficacious as a final judgment upon a verdict.

We can not escape the conclusion, arrived at by the learned trial justice upon the demurrer to the plea, that the question of the conclusiveness of the proceedings and decree set up in that plea depends solely upon the jurisdiction of the Orphans' Court in the premises, without regard to the issues, the parties, the trial, or the verdict in the Circuit Court.

The jurisdiction of the court whose judgment or decree is offered as a bar or an estoppel between the same parties in another controversy, is a necessary element of the rule as declared in the Duchess of Kingston's case, substantially as follows: The judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or evidence, conclusive between the parties upon the same matter, brought directly in question in another court; and the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter between the same parties, coming incidentally in question in another court for a different purpose. *Gelston v. Hoyt*, 3 Wheat. 246, 315, 321; *Stone v. United States*, 167 U. S. 178, 186, 189.

We think it plain, therefore, that the verdict, if it be considered at all, as well as the decree of probate, must be limited in operation strictly to the contest of the will as a will of personal property only, because of the entire absence of jurisdiction of the Orphans' Court over the devise of real property.

The effect is practically the same as if two separate wills were required by law, one for the disposition of personal and the other of real property. The establishment or the overthrow of one in a court of exclusive jurisdiction over it would have no relevancy in a proceeding involving the validity of the other in a court of exclusive jurisdiction over its subject-matter.

In such event there might be conflicting verdicts and judgments in the separate courts between the same parties upon the same facts. That a like result may follow, in this case, where there is but one will disposing of the two classes of property, constituting an anomaly in the law and even a "very great absurdity," to use the language of Lord Hardwicke, can not be permitted to affect our conclusion. The remedy for the mischief lies within the province of the legislature, and not of the courts. These can not make the law what they may think it ought to be; they can only de-

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clare it, as they find it to exist, in application to a case submitted for their adjudication.

The interlocutory order sustaining the demurrer to the special plea will be affirmed, with costs to the appellee, and the cause remanded for further proceedings. It is so ordered.

*Affirmed.*

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## SOMERVILLE

v.

## THE KNIGHTS TEMPLARS AND MASONS' LIFE INDEMNITY ASSOCIATION.

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LIFE INSURANCE; SUICIDE; PRESUMPTIONS; VERDICT, DIRECTION  
OF BY TRIAL COURT.

1. A stipulation in a policy of insurance relieving the insurer of liability, except for assessments paid, in case of the suicide of the insured, whether voluntary or involuntary, sane or insane, is valid and will be given effect according to the terms of the contract.
2. If in a suit on a policy of insurance containing such a stipulation where the defence is suicide, the evidence is so clear as to exclude any other rational hypothesis than that of suicide as the cause of death, the ordinary presumption against the fact of suicide will not be allowed to counteract and destroy the rational conclusion deducible from such clear and definite proof, and it is proper for the trial court to direct a verdict for the defendant.

No. 661. Submitted October 8, 1897. Decided November 4, 1897.

HEARING on an appeal by the plaintiffs from a judgment on a verdict directed by the court in an action on a policy of insurance. *Affirmed.*

The Court in its opinion stated the case as follows:

This action was brought upon a policy of life insurance,  
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issued by the defendant, the Knights Templars and Masons' Life Indemnity Company, to Frank Schwarz, on the 13th of June, 1892, for \$5,000. Schwarz, the holder of the policy, was found dead on the morning of the 30th of December, 1892; and up to the time of his death he had paid all the assessments called for, amounting to the sum of \$19.50. The wife of the deceased was the original beneficiary in the policy of insurance, but the assured, on the 15th of October, 1892, procured the policy to be transferred to his personal representatives, but for what reason does not appear. The present action is brought by the executors of the deceased, and the recovery was for the \$19.50 only, the amount of the assessments paid.

The defence to the action was that the deceased, Schwarz, came to his death by self-destruction or suicide, and therefore, under a condition of the policy, the plaintiffs were not entitled to recover more than the \$19.50.

Among the conditions or stipulations contained in the policy is the following:

"In case of the self-destruction of the holder of this policy, whether voluntary or involuntary, sane or insane, this policy shall become null and void and the widow or heirs or beneficiaries of said member shall have no claim for benefits on this company. Provided that in the case of such self-destruction or suicide of the holder of this policy, then this company will pay to his widow or heirs or devisees only such an amount on this policy as the member shall have paid to this company on this policy in assessments on the same, without interest. Upon violation of any of the foregoing conditions this policy shall be null and void, without action on the part of the company or notice to the insured or beneficiary, and all payments made hereon and all accrued surplus or profits shall be forfeited to the company, except as above provided."

There is no controversy whatever in regard to the facts of the case, the question being whether the facts shown clearly

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proved that the assured committed suicide. The plaintiffs, upon the proof of death of the assured, and the policy held by him, and that he had paid all assessments called for by the defendant, rested their case. And the defendant then gave evidence of the facts and circumstances that tended to show how the assured came to his death. These facts and circumstances are very clearly and concisely stated in the bill of exception, and we shall repeat them as there stated:

"Thereupon the defendant, to maintain the issues on its part joined, gave evidence tending to prove that the dead body of the insured, Frank Schwarz, was found by a police officer of the city of Washington on its back, feet being toward the east, in the early morning of December 30, 1892, rigid and the clothing covered with frost, in an open field just beyond the boundary of the city of Washington, District of Columbia; that on the left hand there was a kid glove, which hand held in its grasp the fellow glove, and that the right hand was ungloved; that a revolver, from which one shot had been fired, lay upon the ground about two feet from the right hand; that his watch and chain, pocket-book, and other valuable articles were found undisturbed upon the body of the deceased; that a pistol shot had penetrated his left breast just above the heart, which caused his death; that the body was clothed in underclothes; a suit of ordinary outer clothing, and an overcoat; that there was no sign of scorching or burning on the clothing; that there were no marks of footprints on the ground near or nearby the body which would indicate that there had been a struggle or altercation. The body was taken to the morgue in the city of Washington by the police of said city, and it was admitted by the plaintiffs to be the body of Frank Schwarz. Further, it was admitted by the stipulation of the parties that the deceased, on the 29th day of December, 1892, was indebted to the Anheuser-Busch Brewing Company in the several sums mentioned in a proof

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of debt filed by said company in the office of the register of wills of this district; that said proof showed that the deceased at various times from February, 1892, to December 31, 1892, had collected as agent of said company various sums on accounts and notes of that company for which he had not accounted, and which amounted in the aggregate, with interest, at the time of his death to the sum of \$2,843.93.

"Further, the defendant gave evidence from the policy that on the 15th day of October, 1892, the deceased had transferred the policy in question from his wife, who was the original beneficiary thereof, to his personal representative. Further, the defendant gave in evidence a letter which it was admitted in the stipulation Schwarz on December 29, 1892, wrote, signed and transmitted to Robert T. Heiston, one of the plaintiffs, a copy of which letter is as follows:

"DEC. 29, 1892.

"MY DEAR ROBERT: When this reaches you your friend will be among the great army of the other world. I find that I cannot exist any more. Your check to-morrow and some other obligations are all piling up, and I cannot meet them. There are also some other matters which must be adjusted and which I ask that you arrange as best you can. As to Anheuser-Busch matter, Vinton can give you information about them. I know there is enough property, etc., here to cover my obligations, and were I as good a borrower as I am or have been a lender things might go different. Bob, dear fellow, do for me what I would have done for you, and when some one says an unkind word I know you will say a kind one instead. All the papers herewith are arranged so that you can use them with effect towards liquidating my indebtedness to you, which I assure you is my sole object. Have me buried quickly and quietly and forget me afterwards. I have imposed the disagreeable task upon you and Br. Somerville to act as my executors. Good-bye.

"FRANK.

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Argument of Counsel.

"Let Walter sell the horses and you use the money to settle up matters."

It was further admitted that said Hieston received the letter just recited, together with other papers, through the mail, on the morning of December 30, 1892; and thereupon the evidence was closed, and no further or other evidence was offered by either side.

Upon the foregoing evidence the court, at the instance of the defendant, instructed the jury that their verdict should be for the defendant, in respect to the plea or defence of suicide of the assured, but, by the terms of the policy, the plaintiffs were entitled to recover \$19.50, without interest, that being the amount of the assessments paid by the assured.

*Messrs. R. Ross Perry & Son* for the appellants:

1. It is well settled that the presumption of law is against suicide when death can be referred to any other cause. In such a case suicide is peculiarly a fact for the jury. *Home Benefit Ass'n v. Sargent*, 142 U. S. 691; *Casey v. National Union*, 3 App. D. C. 510; *National Union v. Thomas*, 10 App. D. C. 277; *Insurance Co. v. McConkey*, 127 U. S. 661, 667; *Mallory v. Insurance Co.*, 47 N. Y. 52; *Pierce v. Insurance Co.*, 34 Wis. 389; *Shank v. United Brethern*, 84 Penn. St. 385; *Newton v. Insurance Co.*, 2 Dill. 154; *Insurance Co. v. Bennett*, 90 Tenn. 256; May on Insurance, Sec. 325.

2. Since in the present case the defendant admits the issuance of the policy and the payment of premiums due thereon by the insured, the burden of proof is on it to prove that the death of the insured was brought about by a cause excepted from the operation of the policy. *National Union v. Thomas*, 10 App. D. C. 277; *Home Benefit Ass'n v. Hall*, 142 U. S. 691.

In *Leman v. Insurance Co.*, 46 La. An. 1189, it is said that when circumstantial evidence alone is relied on to establish suicide, it is at least within bounds to say the evi-

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dence must be of a character to exclude with reasonable certainty any other cause of death.

*Messrs. Needham & Cotton* for the appellee.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

The only error assigned on this appeal is, that the court was not warranted in taking the case from the jury, in respect to the right of the plaintiffs to recover the amount of the policy sued on. And the question to be considered is, whether there was evidence sufficient to justify the jury in finding that the assured came to his death from other cause or causes than suicide. If the evidence was not sufficient to justify such finding, but was clear to the fact that the cause of death was suicide, there can be no question of the correctness of the court's ruling in taking the case from the jury.

It is well settled that a condition or stipulation, such as we have recited from the policy in this case, to avoid liability in case of suicide of the assured, sane or insane, is valid, and must be given effect by the courts, according to the terms of the contract of the parties. In the case of *Bigelow v. The Berkshire Life Ins. Co.*, 93 U. S. 284, it was expressly held, that a stipulation in a life insurance policy that it should be void if the insured should die by suicide, *sane or insane*, was valid; and that it was no answer to such a stipulation that the insured was of unsound mind and wholly unconscious of the act. There are other cases that hold the same principle.

The only question, therefore, is whether the evidence of suicide is so clear and definite as to preclude all reasonable doubt of the fact, or, in other words, whether the evidence is so clear as to exclude any other rational hypothesis than that of suicide as the cause of death. Mere wild, irrational conjecture as to the cause of death will not suffice to over-

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come clear and definite proof. It is true that, in case of real doubt, the presumption is against the fact of suicide. But where the evidence is all on one side, and that of a character to establish beyond a reasonable doubt the fact that suicide has been committed, the ordinary presumption opposed to that fact can not be allowed to counteract and destroy the rational conclusion deducible from such clear and definite proof.

Here, the claim of the plaintiffs is attempted to be supported upon the surmise that the assured may have come to his death by accident, or by the hand of a robber, or in conflict with some unknown person. But each and every circumstance in proof tends directly, and with a force that can not be resisted, to repel such hypothesis. The writing and mailing of the letter, the circumstances referred to therein as inciting him to the desperate and fatal act, and the plainly expressed intention of ending his life by his own hand, followed within a few hours by the clearly apparent execution of his predetermined purpose, can leave no room for possible doubt as to the real cause of his death. Then, too, the time and place of his death, and the evidence that the pistol had been used by his ungloved right hand, and the entire absence of any circumstance whatever that would indicate accident, or that there had been a conflict with any other person, all force the mind irresistibly to the conclusion that the cause of death was suicide. Indeed, if this proof does not clearly and beyond rational doubt establish the fact of suicide, there is no such thing as establishing such fact except it be by ocular proof furnished by witnesses who were present at the scene of death. There is no case where the presumption against the fact of suicide has ever been indulged to such an extent.

We think the court below was quite right in withdrawing the case from the jury, and directing a verdict for the defendant, as was done. A verdict for the plaintiffs, upon the facts of this case, would have been without the slightest evi-

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dence to support it, and grossly against evidence, and it would, consequently, have been the duty of the court to set such verdict aside. A case presenting such state of facts as the present simply requires the court to relieve the jury of all consideration of it; and this is the settled principle in the practice of the courts of this District, and of the courts of the United States generally. *Pleasants v. Fant*, 22 Wall. 116; *Prigg v. Lansburgh*, 5 App. D. C. 30; *Hendrick v. Lindsay*, 93 U. S. 143; *Randall v. Railroad Co.*, 109 U. S. 478; *Elliott v. Railroad Co.*, 150 U. S. 245, 247; *Union Pacific R. Co. v. McDonald*, 152 U. S. 262; *Phoenix Ins. Co. v. Doster*, 106 U. S. 30.

The cases relied on by the plaintiffs as giving support to their contention are those of *Home Benefit Asso. v. Sargent*, 142 U. S. 691, and *National Union v. Thomas*, 10 App. D. C. 277. But those cases are distinguishable in their circumstances from the present case. It may be said, however, of both those cases, that they stand upon the extreme border line of the principle requiring the facts to be submitted to the jury; and the first of those cases was not decided by unanimous opinion. They should therefore stand on their own special circumstances, and not be invoked as precedents except upon an exactly similar state of facts.

The judgment must be affirmed; and it is so ordered.

*Judgment affirmed.*

D. C.]

Syllabus.

SMITH v. HERRELL.

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**ASSIGNMENT FOR CREDITORS; ASSENT OF CREDITORS; PRESUMPTIONS; ATTACHMENT.**

1. An assignment by a debtor to a creditor of a fund due him under a contract with the District of Columbia for the erection of school buildings, with directions to the assignee after paying his own claim, to distribute the residue among certain other creditors, passes the legal title to the fund and creates a trust for the creditors named although at the time some of them had no knowledge of the transaction and did not assent thereto.
2. In such case, the presumption of law is, in the absence of all evidence to the contrary, that the parties accepted the benefit of the assignment.
3. And in such case, the residue of the fund in the hands of the assignee is not subject to attachment by other creditors of the assignor, especially where such residue was not sufficient to discharge the claims of creditors named in the assignment who were present and agreeing to the disposition, and who in order to effect it withdrew their claims previously filed under a regulation of the District, thus making the assignment to stand upon a valuable consideration as to them.

No. 688. Submitted October 12, 1896. Decided November 9, 1896.

HEARING on an appeal by a plaintiff in attachment from a judgment entered upon a verdict directed by the court in favor of a garnishee. *Affirmed.*

THE COURT in its opinion stated the case as follows:

This is an appeal from a judgment rendered as issues arising out of a writ of garnishment. The appellant, Thomas W. Smith, had a judgment against Monroe and obtained an attachment thereon October 12, 1896, upon which, on the same day, the marshal attached credits in the hands of the appellee, John E. Herrell, and served him with the usual interrogatories as garnishee. Herrell, under

oath, denied indebtedness to Monroe, and issue was joined thereon. At the close of the evidence, the court directed a verdict for the garnishee.

It appears that Monroe had been the contractor with the District of Columbia for the erection of certain school-houses, and had become involved in debt. He was indebted to Herrell in the sum of \$4,608.71, for money advanced to complete the buildings, pay labor, and so forth. There was an arrangement between Monroe, Herrell and the Auditor of the District that the checks to Monroe for the money due him should be paid to Herrell. The two parties went to the Auditor's office on October 10, 1896, to receive the checks. They were accompanied by Campbell, White and Schneider, to whom Monroe was indebted, severally, for material and supplies used in the performance of the contract. There had been immediately before this, a great number of small claims for material and supplies furnished to Monroe, for the same purpose, filed with the Auditor. These amounted to the sum of \$1,447.54. In accordance with a regulation of the District, that seems to be incorporated in all such contracts, the Auditor announced his intention to withhold the checks until the foregoing claims and others should be paid or withdrawn. Campbell, White and Schneider had also filed their claims with the Auditor, but agreed to, and did, withdraw them in consideration of the agreement hereafter recited. It was then agreed between Monroe and Herrell, the others consenting, that Herrell should pay the small claims in full, receive the checks, and make the following disposition of the money : Pay himself in full for all advances, and pay the remainder *pro rata* to eleven other named creditors, among whom were Campbell, White and Schneider. The Auditor then received Herrell's check for \$1,447.54, to cover the smaller claims under the agreement, and delivered the checks due Monroe, who then and there indorsed them to Herrell.

The checks received and cashed by Herrell amounted to

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Argument of Counsel.

the sum of \$9,524, and after deducting the last advance and the former sums due him, there remained for distribution the sum of \$3,469. On the same day, and in execution of the verbal agreement and direction, Monroe gave Herrell a writing signed by himself, saying: "Please pay to yourself \$4,608.71, and pay the balance *pro rata* to the following claimants according to the amount of bills approved by me."

A list of eleven creditors is attached and includes the names of Campbell, White and Schneider. The remaining eight creditors had no knowledge of this assignment before the attachment was issued and served.

The sums due by Monroe to the creditors named as beneficiaries amounted to \$8,872.99, and no attack has been made upon any one of them as fraudulent or excessive. They were all on account of materials furnished Monroe in the performance of his contract for the erection of the schoolhouses.

*Mr. Clarence A. Brandenburg* and *Mr. S. T. Thomas* for the appellant:

The principles applicable to trusts created, or to perfected assignments, have no application to this case. We have here plainly a bailment or agency, created by Monroe (so far as the balance in the hands of Herrell is concerned), for the payment of Monroe's debts. We are seeking to subject the fund to the payment of a debt of Monroe. As bearing upon the matter and upon questions which may arise in the consideration of the case, the following authorities are cited: *Drake on Attachments*, Secs. 525, 526; *Clark v. Cilley*, 36 Ala. 652; *Sterrett v. Miles*, 87 Ala. 472; *Kelly v. Roberts*, 40 N. Y. 432; *Center v. McQuesten*, 18 Kans. 476; *Briggs v. Block*, 18 Mo. 281; *Hearn v. Foster*, 21 Tex. 441; *Story, Agency*, Secs. 465, 477.

*Mr. J. J. Darlington* for the appellee:

Authorities exist to the effect that a mortgage or other

provision by debtor in favor of creditors who have no knowledge of it, will fail as against other creditors who attach before the mortgagees acquire knowledge, and approve; on the ground that two parties, and the assent of each, are essential to every contract. This principle, in its application to cases like that at bar, however, does not prevail here, but gives place to the contrary presumption, under which *femes covert* and insane persons, even, may take by conveyance; namely, that the grantees will accept what is for their benefit. *Webster v. Harkness*, 3 Mackey, 220; *Tompkins v. Wheeler*, 16 Pet. 118-119; see also *Holsey v. Whitney*, 4 Mason, 214; *Marbury v. Brooks*, 11 Wheat. 96-8; *Treadwell v. Buchly*, 4 Day, 395; *Thompson v. Leech*, 2 Salk. 618; *Guggenheimer v. Lockridge*, 19 S. E. Rep. 874.

The present case, however, does not turn at all upon either the rejection or the adoption of the principle in question. That principle, as stated above, rests upon the theory that there must be two or more assenting parties to every contract, and that the mere voluntary act of the debtor, in executing a mortgage or assignment in favor of certain of his creditors, is the act of one party alone, not a contract until the other party or parties know of and approve it. But the case at bar presents no such unilateral act, by a single party. Mr. Monroe, the debtor, owed to Mr. Herrell, and to the creditors who had filed their claims, considerably more than the entire amount which was due him from the District of Columbia. Not a dollar, under any circumstances, could come to his hands. These creditors, whose claims were actually filed, and all of whom were there present, contracted with him and with each other that Mr. Herrell should draw the fund, satisfy his own advances, pay certain smaller claimants in full, and distribute the residue *pro rata* among themselves and others in like situation. No authorities can be found which deny that this was a valid and effectual contract. The claims of the actually contracting creditors were more than enough

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to absorb the entire fund. Had they agreed to a *pro rata* distribution between themselves and nine mere strangers, who had no claims whatsoever, the latter could have enforced the agreement by suit against Mr. Herrell. *Hendrick v. Lindsay*, 93 U. S. 149.

Mr. Justice SHEPARD delivered the opinion of the Court:

1. The appellant assigns error upon the charge to the jury, and contends that an instruction should have been given instead to find for the plaintiff for the amount remaining in the hands of the garnishee, after deducting his own demands and the proportions due Campbell, White and Schneider. The contention is, that by the direction to pay the money upon the claims of certain creditors, Herrell became a mere agent or mandatary of Monroe, in respect of those creditors, at least, who were not parties to the agreement, and had no knowledge of the transaction, and had not assented thereto before the service of the writ; and that it created no beneficial interest in them, but remained subject to the revocation of Monroe, and liable to the claims of his attaching creditor.

The English rule in such case now is that a formal trust deed by which property is conveyed for the benefit of creditors does not, of itself, create an enforceable trust for the benefit of each of them. Whatever doubt there may have been on the subject was settled by the Court of Appeals in *Johns v. James*, L. R. 8 Ch. Div. 744, following the old case of *Garrard v. Lord Lauderdale*, 2 Russ. and My. 451. The principle controlling the decision is that invoked on behalf of the appellant, namely: A common law deed of assignment in trust, until actually accepted by the creditor, ought to be considered as a mandate, just as in the case where one gives money to his servant with direction to pay a certain debt; neither act creates a right in favor of the creditor, but leaves the property or fund subject to the direction of the debtor before performance by the agent or mandatary.

The majority of the American cases, wherein this question has been decided, are probably in accord with the established English doctrine; but we are spared their examination and review by what we understand to be the rule of the Supreme Court of the United States to the contrary. *Brooks v. Marbury*, 11 Wheat. 78, 97; *Tompkins v. Wheeler*, 16 Pet. 106, 118. In both of those cases conveyances had been executed transferring personal property in trust for sale and application of the proceeds to the payment of certain of the assignor's creditors. In the first case the deed was to a party not himself a creditor.

Chief Justice Marshall, who delivered the opinion of the court, stated the question and answered it as follows: "The single inquiry is whether the assent of the creditors be necessary to the completion of the deed? If it be, then the title of the property it purported to convey remained in Fitzhugh until such assent should be given, and might be subjected to this attachment. . . . Deeds of trust are often made for the benefit of persons who are absent, and even for persons who are not in being. Whether they are for the payment of money, or for any other purpose, no expression of the assent of the person for whose benefit they are made has ever been required as preliminary to the vesting of the legal estate in the trustee. Such trusts have always been executed on the idea that the deed was complete when executed by the parties to it."

In the second case, the deed was directly to the creditors, and was attacked by an unsecured judgment creditor, whose bill charged, among other things, that it "was made without the knowledge, privity or assent of the creditors named therein and who are the parties to whom the deed is given," and "was never delivered to or accepted by the grantees."

The court finding that some of the creditors had assented, as shown by their answers, while others had not, and there was no evidence that any one had dissented, sustained the assignment, saying: "This deed is absolute upon its face,

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without any condition whatever attached to it; and being for the benefit of the grantees, the presumption of law is, in the absence of all evidence to the contrary, that the grantees accepted the deed."

It is argued that the foregoing cases are distinguishable from this, because in each case the property had been conveyed by deed regularly recorded in the registry of deeds. We are unable to appreciate the distinction. Apparently, the fact that the assignment was by deed cut no figure in the decision of those cases, any more than it was allowed to affect the conclusion of the English court. In this case the transfer of the legal title to the money, by the actual delivery to Herrell, was as complete as if it had been accompanied by an instrument under seal declaring that effect. The question is entirely independent of the mode and manner of the transfer of the legal title, provided it be effective of that result. In either event the question remains the same. Nor are we able to perceive that any difference is made by the fact that the deeds sustained in those cases were regularly recorded. The recorder was not the agent of the creditors to accept for them the benefit of the trust. Under certain circumstances and for certain purposes delivery to a recorder for record may constitute a delivery of a deed so as to make it operative as a deed; but no such question was involved. Delivery to a recorder of a trust deed executed without the knowledge or assent of the beneficiaries named therein, could no more make it binding and effective than delivery to the trustee named and specially charged with the execution of the trust on behalf of the beneficiaries.

The very question here presented was before the Supreme Court of the District in general term, in a case almost identical with this in point of fact, and the assignment was held to create a trust in favor of the uninformed, and hence unassenting, creditors. *Webster v. Harkness*, 3 Mackey, 220.

This case is stronger than that, as we shall see, in one important particular. In that case, the failing contractor collected the money due him from Harkness, who acted for the owner of the building in making settlements. He returned the money to Harkness and instructed him in writing, substantially as in this case, to pay the money to certain creditors.

The preferred creditors were not parties to the arrangement, and the attachment was sued out and served before they had heard of it. The opinion contains an able and instructive discussion of the point, and review of many of the cases bearing on it, and draws a distinction between such cases, where the intention to create a trust is evident, and that of a mere delivery of money or property to a servant, an agent or mere mandatary, for the convenience or advantage merely of the master or principal. The difference referred to between that case and this is, that Harkness had no interest whatever in the matter, while here Herrell was the largest creditor and beneficiary himself, and was joined by three other creditors. In both cases, the money was actually delivered for the purpose, and the letters merely followed and made certain, as evidence, the directions for the distribution. In the opinion in that case, no stress was laid on the fact that there was a letter of instructions to Harkness.

2. Even if the rule contended for by the appellant had been established in this jurisdiction, the particular facts of this case would bring it within an exception thereto that seems to be well established in England and in some States where the English doctrine prevails. *Siggars v. Evans*, 32 Eng. Law and Eq. 139, 144; *Schoolfield v. Hirsh*, 71 Miss. 55, 58; *Hastings v. Baldwin*, 17 Mass. 552, 556.

It will be remembered in this case that Herrell was himself the principal creditor and chief beneficiary of the trust. Campbell, White and Schneider were also creditors in considerable sums. They were not only present and agreeing

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to the disposition of the fund, but they withdrew their claims as filed in order to effect it, thus making it stand upon a valuable consideration as to them. Whilst the other creditors were not then aware of the assignment, and had not expressed their acceptance of its benefits before the garnishment of Herrell, they have never renounced or dissented. In the Mississippi case, cited above, it was said: "The books make a wide distinction between a transfer directly to a creditor and one to a trustee for creditors." . . . "It seems also to be affirmed by most respectable authorities in England and America that when an assignment is made, not to a stranger, a mere trustee, but to a creditor in trust for others, that this makes the required assent of all to the assignment, or that no other assent than that of the creditor to whom the assignment is made is necessary."

In *Siggars v. Evans, supra*, the assignment was made to a creditor in trust for himself and others, without his knowledge or theirs. It was sent to him by mail, and it does not appear clearly that he received it until after the attachment was executed upon the property assigned. His acceptance was not received until afterwards. Lord Chief Justice Campbell, who delivered the opinion of the court, seems to assume that notice was given before the attachment, a fact which is obviously not important here. Recognizing the rule that acceptance is necessary in the case of an assignment to a mere trustee, he said: "We do not think, however, that we ought to extend this principle by applying it to a case where the party taking the legal interest under the deed had also a beneficial interest. In such a case it seems impossible to treat him as a mere mandatary. No assent of any third party, as creditor, to come in under the deed, can be necessary to perfect his title, and he seems to have a right to claim directly under the deed as a party taking a legal and equitable interest, and not as a mere mandatary who must obey the directions and is subject to the revocation of

the orders of his principal." It may be remarked too, that in *Tompkins v. Wheeler, supra*, the assignment was to certain of the creditors in trust without the intervention of a disinterested third party; but the decision was not upon that ground.

3. If, however, we were to hold to the rule as contended for by the appellant, and deny the foregoing exception thereto, it is not perceived how he could receive any advantage. The judgment would have to be affirmed, nevertheless, because there would still be no fund in the hands of the garnishee upon which the writ could operate.

The direction to Herrell was to distribute the fund *pro rata* among certain named creditors. Among these were the aforesaid Campbell, White and Schneider, who were themselves parties to the agreement. They not only assented, but also parted with a consideration. Their claims amounted, together, to the sum of \$4,333.40.

After paying his own demand and advances, the garnishee had left for distribution the sum of \$3,469.00, nearly one thousand dollars less than the claims of the three creditors aforesaid. Now, if the remaining creditors had been at once informed and had expressly renounced and repudiated the trust for their benefit, what would have been the result? Their renunciation would not destroy the trust for the others; its only effect could be to increase the dividends of the accepting creditors. Herrell had accepted the fund under a promise of fulfillment. If he had refused to recognize any beneficial interest in Campbell, White and Schneider, they might have sued him in *assumpsit*, upon the promise made to Monroe for their benefit, even if they had not been actual parties to the agreement upon a consideration deemed valuable in law. *Hendrick v. Lindsay*, 93 U.S. 143, 149.

Treating the case, then, as if the other creditors had expressly dissented and refused to accept, there was not enough of the fund left to discharge the debts due to Campbell, and

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White, and Schneider, respectively. Consequently, the court could not have charged otherwise than to find for the garnishee.

The judgment is right, and must be affirmed, with costs. It is so ordered.

*Affirmed.*

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**CHESTER v. MORGAN.**

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**APPELLATE PRACTICE ; CITATION ; APPEALABLE ORDERS ; SPECIFIC PERFORMANCE.**

1. A citation must be issued within five days after an appeal is taken under the rules of this court, and a failure to do so will subject an appellant to the dismissal of his appeal, unless there has been a waiver by the appellee, or the appeal has been taken in open court at the term at which the decree appealed from was rendered.
2. An order denying a petition for a rehearing and incidentally for leave to amend a bill of complaint, is not appealable.
3. A bill for the specific performance of an agreement to convey real estate in consideration of the performance of professional services considered, and an order sustaining a demurrer to it *affirmed*, upon the ground that the bill was too vague, indefinite and insufficient to justify the divesting of vested rights, but *modified* upon the equity manifested, so as to dismiss the bill without prejudice to complainant to institute another suit, if so advised.

No. 701. Submitted October 19, 1897. Decided November 18, 1897.

HEARING on an appeal by the complainant from a decree dismissing a bill for specific performance. *Modified and affirmed.*

The COURT in its opinion stated the case as follows :

This is a suit in equity to enforce specific performance of

an alleged contract for the conveyance of certain real estate in the city of Washington.

The bill of complaint, which was filed by the appellant here, Augustin Chester, as complainant, on November 24, 1896, sets forth that, on or about May 27, 1879, the complainant purchased a house and parcel of ground known as No. 1016 Eleventh street, northwest, in the city of Washington, the ground being lot No. 21 and part of lot No. 22, in the square No. 316; but that the title to the property was taken in the name of Ebenezer Morgan, now deceased, who furnished the money for the purchase, which was the sum of \$5,500. The circumstances of the transaction, as stated in the bill of complaint, were these: The complainant had been retained by Ebenezer Morgan as his counsel and attorney in several important cases, and had rendered valuable professional services to him; and for the purpose of procuring a home for the complainant, Morgan furnished the sum of \$5,500; but as this sum had not yet been fully earned by the complainant, the title to the property was taken in the name of Morgan. Under an understanding between himself and Morgan, the complainant took possession of the premises, and has continued to occupy it as a residence to the present time; and has also expended, as he claims, over \$2,000 in improvements thereon.

The bill of complaint further proceeds to state "that after the complainant had performed professional services for the said Ebenezer Morgan under the said retainer, in most of the cases to a final settlement, which said services were of value far in excess of the fifty-five hundred dollars purchase-money as aforesaid, the complainant called upon the said Ebenezer Morgan to convey the said property to him (the complainant); which demand the said Morgan refused to comply with, but at the same time the said Ebenezer Morgan, in writing, declared that if the complainant would complete to final settlement two of the uncompleted cases, to wit, one, the action instituted by a certain Nancy Salter

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against the said Ebenezer Morgan in the Supreme Court of Suffolk County, in the State of Massachusetts, and the other a suit brought by Morgan against J. Austin Rogers in the United States Circuit Court for the District of Rhode Island, then the said Ebenezer Morgan would pay the complainant ten thousand dollars or give him a deed in fee to the premises above described at the option of the complainant."

The bill further proceeds to state "that the complainant accepted said declaration in good faith and undertook and did fully perform his part thereof, and that the said suit against J. Austin Rogers was settled by the complainant in person, and that the action brought by the said Nancy Salter was finally terminated under the instructions, advice, and counsel of complainant;" "that the complainant, under the said declaration, as he had the right to do, elected to take a deed in fee for the premises aforesaid;" but "that, although requested so to do, the said Ebenezer Morgan, now deceased, and these defendants (meaning the appellees here) have totally failed, neglected and refused to execute and deliver to the complainant a deed in fee for the said premises."

The prayer of the bill was for the execution of a deed by the defendants; or, in default of such execution, for the appointment of a trustee to execute the same. With the exception of the statement of the place of residence of the complainant, and that of the defendants, who all appear to be nonresidents of this District, and who are alleged to be the heirs at law of Ebenezer Morgan, this is the whole sum and substance of the bill of complaint.

Upon the interposition of a demurrer to it by the defendants, the demurrer was sustained and the bill was dismissed.

From some recitals in the decree of dismissal and a note appended thereto by the justice who heard the cause, it appears that, upon the sustaining of the demurrer, the counsel for the appellant asked leave verbally to amend the bill of complaint, but without stating or offering to state any ground for the application; and for the want of such state-

ment the court refused the application, and pronounced the decree of dismissal, which was rendered on April 14, 1897.

Two days afterwards, on April 16, 1897, a petition for a rehearing and for leave to amend was filed. The allegations of this petition showed that on September 17, 1888, the complainant had filed a previous bill of complaint against Ebenezer Morgan, who was then living, for the same precise purpose for which the bill in the present case was filed, to procure to have the title to the property in question vested in himself; that, upon the death of Ebenezer Morgan—the date of which nowhere appears in the transcript of record, but which is stated in one of the briefs to have been in 1890—the cause was revived against his widow and his heirs at law; that on October 12, 1896, the bill of complaint in that case had been dismissed by the court for want of evidence to support it; that on October 16, 1896, a petition for rehearing had been filed in that cause on the ground of newly discovered evidence, such newly discovered evidence consisting of a letter from Ebenezer Morgan to the complainant, written on November 25, 1886, and a copy of which was annexed as an exhibit to the petition; that the court refused the rehearing on the ground that the letter made a different case from that sought to be made in the bill of complaint which was that of a resulting trust; that the court, however, modified the decree of dismissal by making it to be without prejudice to the complainant to institute another suit; and that thereupon the complainant, having been advised that he had mistaken his remedy in the preceding suit, instituted the present proceeding. For these reasons the petitioner asked leave to amend his bill so as to show in it that the preceding bill had been dismissed without prejudice; that there was a contract in writing between himself and Ebenezer Morgan, under date of November 25, 1886 (the letter hereinbefore referred to), for the conveyance of the property to the complainant; that the complainant had performed his part of that contract before

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October 14, 1887, and had thereupon elected to take the real estate (instead of the alternative \$10,000), and had requested a conveyance thereof from Morgan; that there was no relation of landlord and tenant between Morgan and himself; that his improvements upon the property were not in lieu of rent; and that his claim to a deed had been continuously asserted from prior to November, 1886.

This petition for a rehearing and for leave to amend was denied by the court on May 3, 1897, and on May 19, 1897, the complainant appealed both from the decree of dismissal of April 14, 1897, and from the order of May 3, 1897, denying the petition. Citation was not issued until June 4, 1897, service of which was had on the subsequent day.

*Mr. John Raum* for the appellant.

*Mr. Wm. T. S. Curtis* and *Mr. A. A. Hoehling, Jr.*, for the appellees.

Mr. Justice MORRIS delivered the opinion of the Court:

1. After the filing of the transcript of record in this court, the appellees, appearing specially for the purpose, moved to dismiss the appeal on the ground that the citation had not been issued within the time limited for the purpose by the rules of this court, which require that such citation shall be issued within five days after the taking of the appeal. That motion, however, was continued until the hearing on the merits. It is proper that it should now be noticed.

Citation is intended for the purpose of notice; and parties are not entitled to bring their causes to this court by appeal without due notice to opposing parties, unless there has been a waiver of such notice, or unless the appeal has been taken in open court at the term at which the decree appealed from was rendered. There is controversy in this case whether an appeal was not actually taken in open court; and there is also contention that by the presence of counsel in court when the appeal bond was approved the citation was waived or became unnecessary.

But, in view of the conclusion which we have reached on the merits of the case, although with the admonition that we can not entertain appeals until parties have been duly summoned into court in the mode prescribed by the rules, we deem it unnecessary in the present case to determine the question here raised by the motion of the appellees.

2. The appeal of the complainant from the order of May 3, 1897, denying his petition for a rehearing and incidentally for leave to amend his bill of complaint, can not, of course, be entertained. The order is not an appealable order. It is well settled law that the matter of rehearing, and of granting or refusing leave to amend, is wholly discretionary with the justice who hears the cause, and it is not subject to review in an appellate tribunal. Moreover, the circumstances of the case would seem to indicate that the refusal was entirely proper.

3. Upon the merits of the case we likewise concur in the conclusion reached by the court below.

While the statements of fact in the bill of complaint must for the present hearing be accepted as true, since the cause was heard on the bill of complaint and the demurrer thereto, yet those statements are strangely insufficient and unsatisfactory, when, if the complainant had a good cause, it was exceedingly easy for him to have stated it. It is not made to appear, except by inference or by conjecture, that there was any contract or memorandum in writing signed by Ebenezer Morgan whereby the latter became bound to convey the property in controversy. It does not appear in the bill of complaint when the alleged declaration was made or the alleged contract was executed by Morgan. It does not appear positively that the professional services alleged by the complainant were those required by Morgan. It does not appear when these services were rendered. It does not appear when Morgan died, nor even that he is dead, except by implication, or whether he died testate or intestate; or how the defendants are his heirs at law; or how any duty

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has been imposed upon the defendants in the premises; or what demand, if any, has been made upon the defendants for the performance of such duty. Nor is there any explanation whatever of any kind for the long and unreasonable delay in the enforcement of the claim, if the claim arose as far back as 1887, as we may possibly infer from certain statements in the transcript before us not properly part of any record which we can consider. The bill is remarkably and most extraordinarily vague and indefinite, where certainty was easy, and entire accuracy of statement was within the control of the complainant.

It is very true that some important statements of fact omitted from the bill of complaint appear in the petition filed for a rehearing or in the exhibits annexed to or incorporated with that petition. And even the letter from Ebenezer Morgan to the complainant, under date of November 25, 1886, which seems to be the foundation of the suit, only appears from a reference to it in the petition for a rehearing as an exhibit to the previous petition for a rehearing in the former suit. But we can not consider these petitions and exhibits. They are not introduced into the record before us in any such manner as properly to become parts of that record.

It would be manifestly improper, upon any such vague, indefinite and insufficient bill of complaint as that now before us, to divest and transfer vested rights of property. For the divesting of vested rights, the statement of a bill of complaint, as well as the proofs in support of them, must be strong and satisfactory, and leave no reasonable doubt of the right of the complainant. *Pope Manufacturing Co. v. Gormully*, 144 U. S. 224; *Hennessey v. Woolworth*, 128 U. S. 438.

We cannot see how the court below could well have done otherwise than dismiss the complainant's bill. But inasmuch as the complainant's statement of his case, inadequate though it be, manifests some equity, which he may possibly

be able sufficiently to state and to sustain by adequate proof, we think that the decree of dismissal, notwithstanding that it seems to be the second decree of the same kind, should be without prejudice to him to institute another suit in the premises, if he be so advised. With this modification of the decree of the court below, we are of opinion that the decree should be *affirmed, with costs. And it is so ordered.*

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ROSS v. FICKLING.

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EVIDENCE; REAL ESTATE BROKERS; MUTUAL ACCOUNTS; STATUTE OF LIMITATIONS; APPELLATE PRACTICE; REMITTITUR.

1. Where real estate owners make a contract with a broker to pay him commissions on the sale of lots with building privileges, in which transactions no cash is paid by the purchasers, but the owners advance the money to make certain improvements, secure themselves by deed of trust on the property, and receive from the purchasers a bond conditioned upon the purchasers so making the improvements, and a suit is brought by the broker to recover his commissions on a given transaction, testimony tending to show the insolvency of the purchasers is incompetent, where they did or were ready to give the necessary deed of trust and bond.
2. Where a mutual account exists between parties and the last item is barred by the statute of limitations, it is incompetent for one of the parties to remove the bar of the statute by entering subsequent items on his own side of the account.
3. If a broker having charge of the property of a syndicate makes a contract of sale of lots to a nominal purchaser, to show business, and such purchaser subsequently assigns to a *bona fide* purchaser, who completes the sale, the statute of limitations will run against the broker's claim for commission as of the date of the *bona fide* sale and not of the nominal one.
4. A judgment on verdict in an action of assumpsit *modified* upon condition of the entry in this and the lower court of a *remitter* of a portion of the judgment, the portion held to be erroneous being readily separable from the balance.

No. 710. Submitted October 20, 1897. Decided November 16, 1897.

HEARING on an appeal by the defendants from a judgment

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on verdict in an action of assumpsit by a real estate broker to recover commissions. *Modified and affirmed.*

The COURT in its opinion stated the case as follows:

This is an action in assumpsit instituted by the appellee, Charles H. Fickling, a real estate broker, to recover a balance alleged to be due to him for money advanced and services rendered in and about making sales and finding purchasers for certain parcels of land in a place known as "Cooke Park," in that part of the city of Washington formerly known as Georgetown. The declaration, filed on May 5, 1896, alleges that this property was owned by a syndicate or association consisting of the appellants, who, acting by and through the appellant Samuel Ross, as their manager, and the appellant Charles C. Duncanson as their treasurer, employed the appellee as their agent to make such sales and to find such purchasers. The pleas interposed by the defendants, the appellants here, were *non assumpsit*, payment, and the statute of limitations.

At the trial the plaintiff gave evidence tending to show that, in the year 1891, he had been employed by the Cooke Park syndicate, through Ross and Duncanson, to sell lands in the Park; that he was to have entire charge of making sales, and was to receive a commission of five per centum on the amount of sales for his compensation; that the terms of sale were to be either all cash, or one-fourth cash and the residue on time specified; or in the event of a purchaser agreeing to build upon the land, only a bond and deed of trust were required, without any cash, the syndicate agreeing to furnish the cash under the deed of trust for the purpose of the building; that, in the latter event, a sale with building privileges, as it was commonly called by the parties, the purchasers were to submit to the plaintiff plans and specifications for the proposed building, and a bond to be prepared by a title company, with the names of the bondsmen or sureties thereon, conditioned that the purchaser

would perform the contract; that these papers were there-upon to be submitted to the appellant Ross, and, if they were approved by him, the transaction would be closed.

The evidence on his behalf further tended to show that he sold a large number of lots for one-fourth cash and the residue in instalments; and that there were two sales, with the building privileges so-called, one of eighteen lots to a Mr. Simmons, and one of ten lots to C. J. and J. H. Handback. These transactions, or some of them, extended over the period between September 14, 1892, and March 16, 1893. At least, that is the period covered by such portion of them as is referred to in the plaintiff's bill of particulars filed with his declaration, in the shape of an itemized statement of account between himself and the defendants, which he testified to contain a correct statement of such account.

With reference to the statute of limitations, the testimony in the case, and the gist of the controversy, it seems to be proper to divide this statement of account into two, or perhaps three, parts. The first of these parts would end with March 16, 1893, on which day a payment of \$300.50, if the figures are correct, was made to the plaintiff by Duncanson, treasurer, on general account, which item is the last credit to the defendants in the account, and which apparently then left due to the plaintiff the sum of \$136.98.

The second part of the account includes two items of charge by the plaintiff against the defendants, aggregating \$25 under dates of March 20, 1893, and April 1, 1893. These two parts of the account beyond question accrued more than three years before the institution of the suit, and are therefore barred by the statute of limitations, unless the whole account can be considered as one account with the element of mutuality running through it all, so as to make the running of the statute to begin from the date of the last item. Otherwise than by the interposition of the bar of the statute the items of these two parts do not seem to be controverted between the parties.

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The main controversy is over what we designate as the third part of the account, containing three items of charge by the plaintiff against the defendants, under dates of April 1, April 17 and May 9, 1893, which refer to two transactions that are claimed to have extended themselves and to have been consummated within the period of limitations. These transactions, so far as they are elucidated by the testimony in the record, were these.

On September 14, 1892, the plaintiff sold, or contracted to sell, lot 116 in the Park to his brother, Jeremiah Fickling; and received from him a deposit of \$100, the terms of the contract to be complied with within ninety days. This sale was approved on September 17, 1892, by Ross. On April 9, 1893, Jeremiah Fickling, who seems to have been merely an intermediary, and who was not the only one, it seems, interposed merely to get options and show briskness in sales, assigned his purchase to one Ballantine; and on May 9, 1893, the sale was closed with Ballantine by the syndicate. The question with regard to this is, whether the plaintiff was entitled to his commissions on the nominal and unconsummated sale of September 14, 1892, in which event it is claimed that the statute of limitations would apply, or whether his commissions really became due on the consummated sale to Ballantine on May 9, 1893, which would bring them within the period of limitation.

The second transaction is of an alleged sale by the plaintiff to the Handbacks of lots 57 to 63, both inclusive, with the building privileges; and most of the controversy has expended itself upon this transaction. In reference to it the plaintiff's testimony tended to show that, on November 20, 1892, the plaintiff, in pursuance of his employment by the defendants, as their agent, made a contract, approved by the defendant Ross, to sell to a second syndicate or association, known as Cooke Park Syndicate No. 2, of which the plaintiff himself was a member, seventeen lots, in the Park, in which were included the seven lots, Nos. 57 to

63, both inclusive, here in question; that this second syndicate, like Jeremiah Fickling in the other case, was only a party interposed for the purpose of making a real sale; that it was authorized by the contract to sell or resell the seventeen lots specified, with building privileges, within six months thereafter; that, upon such sale or resale, the defendants were to receive a certain amount specified in the contract, and syndicate No. 2 was to receive the difference between that amount and the price which the new and real purchasers would pay; that thereupon ten of the seventeen lots were sold, with the building privileges, to the Handbacks, already mentioned; that, in making the sale, the plaintiff acted for syndicate No. 2, and in the completion of the contracts for the defendants (syndicate No. 1); that the contract with the Handbacks was approved by the defendant Ross; that, in pursuance of it, the Handbacks entered upon its execution, and built houses on the ten lots; that, during the progress of such construction, the plaintiff, on April 1, 1893, made another similar contract of sale, with building privileges, with the Handbacks for the other seven lots, Nos. 57 to 63, both inclusive, those here in controversy; that, in this part of the transaction, he acted, as in the preceding part, both for syndicate No. 2 and syndicate No. 1; that he submitted the contract of sale, and subsequently also the names of the bondsmen and the plans and specifications, to the defendant Ross; that Ross verbally approved them all; that thereupon he had the usual papers prepared by the title company; and that, on May 13, 1893, he took these papers to the defendant Duncanson, and not finding him in his office, left the papers there for him. Thus far there seems to be no great variance between the testimony of the plaintiff and that of the defendants. But at this point the variance begins.

The plaintiff further proceeded to testify that, in December of 1892, the defendants gave directions to the plaintiff, through Mr. Duncanson, to sell no more lots with the build-

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ing privileges, but that those seven lots, Nos. 57 to 63, were specially exempted from this withdrawal; that, on May 14, 1893, and repeatedly thereafter, the plaintiff had interviews with Duncanson about the closing of the transaction; that some time in July of 1893 the defendant Duncanson refused to execute the contract with the Handbacks, on the ground that the defendants did not at the time have money to advance for building purposes; and that the Handbacks were then, and had always been, ready, able and willing to execute the contract, on their part, and were desirous to do so.

On the other hand, the testimony on behalf of the defendants tended to show that the withdrawal of lots from sale, with building privileges, in December, 1892, was without any reservation of the lots here in controversy; and that Duncanson's refusal to complete the contract with the Handbacks was not for want of funds for building purposes, but because the time for closing the sale had expired. This statement is controverted by the plaintiff.

The defendants also offered to show at the trial, by the defendant Ross testifying as a witness, that the Handbacks were financially embarrassed, and were in fact insolvent at the time; and that he (Ross) for that reason would not have approved of a sale of these lots to them, with building privileges, even if the arrangement continued for selling with building privileges. But the trial court excluded this testimony; and the exclusion is assigned as error.

Instructions to the jury, seven in number, were requested on behalf of the defendants; and three assignments of error are here made upon the rulings of the trial court in regard to them. Two of these have reference to the application of the statute of limitations; and one to the terms of the contract made by the plaintiff with the Handbacks on April 1, 1893.

The verdict and judgment having been for the plaintiff for the whole amount claimed by him (\$687.09), the defendants have brought the cause here by appeal.

*Mr. Andrew B. Duvall* for the appellants:

1. Appellee's accounts were "accounts stated;" as soon as an account becomes stated it ceases to be a mutual account, and the balance becomes immediately subject to the operation of the statute as an original and independent demand. *Spring v. Gray*, 6 Pet. 167; *Mand-Webber v. Tevill*, 2 Saund. 124, 127, note a; *Williams v. Griffiths*, 2 Cr., M. & R. 45; *Cottam v. Partridge*, 4 M. & G. 271; *Waller v. Lacy*, 1 M. & G. 54. And this is a question for the court and not the jury. *Toland v. Sprague*, 12 Pet. 300.

Mutual accounts are made up of matters of set-off, or, in other words, are accounts between parties who have a mutual and alternate course of dealings, under an implied agreement that one account may and shall be off-set against the other *pro tanto*. 2 Wood Limitations, 715, 716.

If this was an account between a tradesman and his customer, and the items in his account were all on one side, some charged within the statutory period, but the others earlier, the former would not entitle appellee to give evidence of the latter. *Cotes v. Harris*, Bull. N. P. 149; *Hallock v. Loose*, 1 Sandf. 220; *Guichard v. Superville*, 11 Tex. 522; *Judd v. Sampson*, 13 Id. 19.

In a continuous account, a payment made within the statutory time and not appropriated will be presumed to be made on account of the items not barred, so as not to defeat the bar as to the others. For mere payments upon account, for which credit is given, do not make the accounts mutual so as to prevent the limitation from attaching. *Webster v. Byrnes*, 32 Md. 86; *Adams v. Carroll*, 85 Pa. St. 209.

To make such accounts mutual they should be open and current and show a reciprocity of dealing. Mere payments on account made by one party for which credit is given by the other will not constitute mutual accounts. *Ingraham v. Sherred*, 17 Sarg. & R. 347. Part payment of a debt, there being no presumption that it was paid on account of the

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debt, will not take the claim out of the statute. *United States v. Wilder*, 13 Wall. 254. See, also, *Coster v. Murray*, 5 Johns. Ch. 522; *Murray v. Coster*, 20 Johns. 576.

The question in this jurisdiction is a new one, and is now presented for decision for the first time. Under like conditions, the Court of Appeals of Maryland considered the question, and on principle and authority held: "That although there are open and mutual accounts between the parties, the fact that one item in the account was within three years, did not withdraw the whole account from the operation of the statute." *Sprogle v. Allen*, 38 Md. 331. In several of the States the same doctrine is established. *Bluir v. Drew*, 6. N. H. 235; *Levernore v. Rand*, 26 Idem, 85; *Lansdale v. Brashear*, 37 B. Mon. 330; *Craighead v. Bank*, 15 Tenn. 399; *Fox v. Fisk*, 7 Miss. 346; *Low v. Dowbarn*, 26 Tex. 507.

*Mr. Clarence A. Brandenburg* for the appellee:

The accounts in this case were mutual, and this being so, the statute of limitations runs against such an account from the date of the last item. *Webster v. Byrnes*, 32 Md. 86; *Green v. Disbrow*, 79 N. Y. 1; *Gunn v. Gunn*, 74 Ga. 555. The reason is that the debt which a party seeks to recover is the balance only after offsetting the items on one side against those of the other.

Mr. Justice MORRIS delivered the opinion of the Court:

1. The first assignment of error, based upon the exclusion by the trial court of the testimony of the defendant Samuel Ross in regard to the alleged insolvency of the Handbacks, is clearly untenable.

While it is entirely true that contracts may often be rescinded or avoided on the ground of the insolvency or financial embarrassment of one or more of the parties to them, yet the contract in question here is plainly not of such a character as to justify the application to it of any

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such rule of rescission. This contract required no payment of money by the Handbacks. The money for building was to be advanced by the defendants; and their solvency was important, not the solvency of the Handbacks. These latter were required to give a satisfactory bond and execute a deed of trust; and they did or were ready to do both. Nothing more was required of them. It does not appear how their solvency or insolvency was relevant to the matter. Moreover, it does not appear that any such objection was raised at the time, or at any time before the trial; and it seems too late to raise it then.

2. The fifth and sixth instructions requested by the defendants to be given to the jury, and upon the refusal of which the fourth assignment of error is based, were substantially to the effect that upon the evidence the plaintiff was not entitled to recover anything with reference to lots Nos. 57 to 63, inclusive. But plainly there was enough in the case to justify the submission of this question to the jury; and the court in its charge properly and fairly submitted it. In fact, this assignment of error, although made in the brief, seems to be abandoned in the argument; for no part of the argument seems to be addressed to it. We regard it, in any event, as untenable.

3. The substantial question in the case is the application of the statute of limitations to the matter of controversy.

It is quite clear to us, both upon reason and upon authority, that the account in this case is not such a mutual account or account current between the parties as in its entirety to take it out of the operation of the statute. It is not, of course, an account stated between the parties, because there was no acceptance of it or acquiescence in it by the defendants; and nothing can be called a mutual account which has not items on both sides. It might well be held that down to the 16th of March, 1893, the date of the payment of \$300.50 by Duncanson to the plaintiff, the account was a mutual account. Duncanson, by his payments, may be held to have admitted

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it, and to have agreed to pay the balance then due to the plaintiff, upon the face of the account. But that agreement became barred by limitation before the institution of this suit; and it was not competent for the plaintiff to remove or obviate that bar by entering items subsequent thereto on his own side of the account. It would wholly destroy the operation of the statute in all cases, if a plaintiff were allowed, by the addition of some new and independent item on his own side of an account, to give new life to an account otherwise barred by the statute of limitations. It might be competent for the person to be charged so to do; but certainly it would not be competent for the plaintiff or person who makes the charge. Since the case of *Bell v. Morrison*, 1 Pet. 351, we must regard it as well settled law that the mere giving of credit by one party to another is not an admission of unsettled account, so as to charge the party to whom the credit is given with the whole account. See *Sprogle v. Allen*, 38 Md. 331; *Murray v. Coster*, 20 Johns. 576; *United States v. Wilder*, 13 Wall. 254; 2 Wood on Limitations, p. 715.

We think, therefore, that the items in the plaintiff's account which are contained in what we have designated as the first and second parts, were barred by the statute of limitations at the time of the institution of this suit, and that the trial court should have so ruled.

With reference, however, to the subsequent items, those that concern the sale of lot 116 and the transaction with the Handbacks, we think that the ruling of the trial court was correct. The sale to Jeremiah Fickling and the sale to syndicate No. 2 were plainly not genuine sales, and were not so regarded by any of the parties. The *bona fide* sales, upon which, if at all, the plaintiff became entitled to his commissions, were those subsequently consummated or effected. Undoubtedly the plaintiff did not become entitled, in view of the course of dealing of the parties, until the defendants had in their possession, or under their control, money, the result of sale, from which commissions were to be paid; or

until, as is claimed to have occurred in the Handback case, the defendants, by their action, prevented the consummation of the contract upon which the plaintiff would have become entitled. If the plaintiff had demanded commissions before the happening of the contingencies indicated, the defendants might well have defended themselves on the ground that the contingencies had not occurred upon the happening of which their liability would have become fixed.

The trial court, therefore, in reference to these two transactions, ruled correctly that if the jury should find the facts to be as claimed by the plaintiff, the statute of limitations would not apply to them. And as the jury found for the plaintiff upon the facts, there seems to be no reason to disturb their verdict on account of the rulings of the court upon the law.

But for the error heretofore noted, by which the application of the statute of limitations to the previous portion of the plaintiff's account was denied, the judgment rendered in the cause must be either reversed or modified. As it is easy, however, to separate that portion of the judgment which is erroneous from that portion which is unobjectionable, it is in the interest of justice that the judgment, instead of being reversed and a new trial ordered, at cost and expense to both parties, should be modified, which may be done if the plaintiff will undertake and agree to remit therefrom the sum of \$161.98, the amount of the items to which we have held the statute of limitations to be applicable. We understand the appellee, both in his brief and in his oral argument, to offer to make this remission in the event of our holding the statute of limitations to be applicable to this amount.

Accordingly, upon the appellee's filing in this court and in the court below within fifteen days a formal remission of the said sum of \$161.98, on the judgment rendered in the cause, such judgment will be affirmed. The costs of the appeal will be divided equally between the parties. *And it is so ordered.*

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Syllabus.

## LAUER v. DISTRICT OF COLUMBIA.

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CRIMINAL LAW; BILL OF PARTICULARS; SELLING LIQUOR WITHOUT A LICENSE.

1. In prosecutions for selling liquor without a license, the prosecution may on motion of the accused be required to file a bill of particulars of the times, places and circumstances of the offence; but the granting of such a motion is within the sound judicial discretion of the trial court.
2. Whether in a given case wherein such discretion is palpably abused so as to work manifest injustice, the action of the trial court is reviewable on appeal, *quære*.
3. When in such a case the guilt of the accused is not made to turn upon a single act of sale to any one person, but upon a course of conduct tending to show he was a common seller of liquor during the period charged in the information, the refusal of the trial court to require a bill of particulars is not error.
4. A general revenue and remedial statute is to be given a liberal and reasonable construction, in aid of the remedy.
5. Under the act of Congress of March 3, 1893 (27 Stat. 567), the furnishing by a boarding house keeper to his boarders and customers of beer with their meals and lunches, and without its being specially called or contracted for, is a sale thereof, which if made without a license is punishable.

No. 729. Submitted November 1, 1897. Decided November 16, 1897.

IN ERROR to the Police Court of the District of Columbia.  
*Judgment affirmed.*

The facts are sufficiently in the opinion.

*Mr. A. A. Lipscomb* and *Mr. Charles H. Turner* for the plaintiff in error.

*Mr. S. T. Thomas*, Attorney for the District of Columbia, and *Mr. A. B. Duvall*, Assistant Attorney, for the defendant in error.

Mr. Justice SHEPARD delivered the opinion of the Court:

1. The plaintiff in error, John H. Lauer, was convicted

in the Police Court under an information charging that on May 5, 1896, "and on divers other days and times," between the said 5th day of May and the 9th day of June, 1897, in the District of Columbia, he "did engage in the sale of intoxicating liquors in quantities less than five gallons, at the same time, to be drunk on the premises, without first having obtained a license so to do," and so forth. The petition for the writ of error was specially granted under the act of Congress of March 2, 1897. 29 Stat. 607.

The information was presented under the twelfth section of an act regulating the sale of intoxicating liquors in the District of Columbia, approved March 3, 1893 (27 Stat. 567). That section, so far as relevant to the points of the case, reads thus: "That anyone engaging in the sale of intoxicating liquors as specified in this act in the District of Columbia, who is required by it to have a license as herein specified, without first having obtained a license to do so as herein provided, or any person who shall engage in such sale in any portion of the District where the sale thereof is prohibited, upon conviction thereof shall be," and so forth.

2. The first question is on the bill of exceptions taken to the order of the court denying a motion of the defendant to require the prosecution to file "a bill of particulars setting forth the names of persons to whom sales of intoxicating liquors are alleged to have been made by the defendant, and the dates of said sales." No motion was made to quash the information, and its general sufficiency has been conceded.

It seems to be well established that in cases of this and kindred character, the trial court may, on motion of the defendant, require the prosecution to file a bill of particulars informing the defendant with more certainty than is found in the information, in respect of the times, places and circumstances of his offence. 1 Bishop Cr. Prac., Sec. 643; *Commonwealth v. Wood*, 4 Gray, 11; Wharton Cr. Pl. & Pr., Secs. 701-703. The author last named, while insisting

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upon this as a right of the defendant, couples it with the not unreasonable condition that he shall first have made an affidavit that, from the generality of the charge, he is unable to make his defence. And it would seem to follow that specifications ought to be ordered in all cases where it may be made to appear that the nature and circumstances of the offence charged reasonably admit of more definite assignment; and also, that the defendant may be unreasonably embarrassed and prejudiced by reason of the unnecessary generality of the charge against him. But notwithstanding this doctrine is generally maintained, the great weight of authority upholding it also sustains the proposition that the grant of such a motion is a matter resting entirely in the sound discretion of the trial judge, and that its refusal is not subject to review in the appellate court. See authorities above cited and also *People v. McKinney*, 10 Mich. 54, 92; *State v. Woody*, 59 Vt. 357.

However, we are not called upon now, nor are we prepared to go the length of holding that there may not be cases of such palpable abuse of discretion, working manifest injustice, that would require an exception to be made to this general rule. No such abuse of discretion, no such injustice, appear in the record of this case. The guilt of the defendant was not made to turn upon a single act of sale to any one person, but upon a course of conduct tending to show that he was a common seller of liquors during the period charged in the information.

It is true there was evidence on the part of one witness of three or four special purchases of drinks of liquor by him from the defendant; and if the conviction depended upon his testimony there might be color for the complaint of surprise and consequent injury worked through the denial of the motion.

But the witness discredited himself, and his testimony was completely ignored in the charge to the jury that has been excepted to.

Evidence was given by several witnesses tending to show that the defendant kept a grocery store and boarding house; and that he was in the habit of setting a bottle of beer beside each plate upon his table, at meal times. It was also shown that he sold lunches to customers and included beer therewith. Parties paid for their lunches, but not for the beer; that is to say, no separate or independent charge was made for the beer.

Whatever expectations the defendant's boarders and customers may have had, there is no evidence to show that beer was specially called for or contracted to be furnished. Defendant made no effort to deny or explain these practices, and based his defence, as we shall see, upon the legal ground that they did not constitute a violation of the law. It is not perceived how he could, reasonably, have been surprised by the evidence, or unjustly deprived of a legal right by the denial of his motion.

3. The second and last assignment of error is founded on exceptions taken to the instructions given and refused on the trial, in application to the above facts stated.

Defendant asked an instruction that "a sale in the eyes of the law must be for money or a promise of money, and that a gift of beer to the defendant's boarders, if *bona fide*, at their meals, is not such a sale; nor is such a gift in payment of wages a sale."

This was refused, and the court instructed the jury as follows: "If you believe from the evidence that the defendant, Lauer, made a business of furnishing beer or intoxicating liquors to his boarders at their meals, such action on his part would be engaging in the sale of intoxicating liquors, under the law, and you should convict, whether the liquor was paid for by them or not. Under the law of this District such disposition of liquor makes a sale. . . . An occasional gift of liquors to his boarders would not be a violation of law."

The correctness of this charge is not to be tested by the

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technical meaning, in law, of the word sale. The question is, what is the meaning of the word as used in the act of Congress under which the defendant has been convicted?

We think there is but one reasonable answer, and that appears in the charge complained of. The statute was enacted with the double purpose of increasing the revenues of the District and providing a remedy for many of the evils that experience had shown to attend the unrestrained traffic in liquors, at retail, to be drunk upon the premises where sold. Notwithstanding the penal clauses, without which it would be a dead letter, the act is to be regarded as a general revenue and remedial statute, and given a liberal and, at the same time, reasonable construction, in aid of the remedy, rather than a strict and narrow one in the interest only of those who violate or evade its provisions.

Turning to the first clause of the first section of the act, we find its object thus comprehensively stated: "That no person shall sell, offer for sale, or traffic in, barter or exchange for goods, in the District of Columbia, any intoxicating liquors except as hereinafter provided."

Read in connection with the foregoing, it is plain that the word sale, as used in section 12, was intended to be given meaning, generally, as any act whereby liquors shall be disposed of by one person to another under circumstances, not within the special exceptions of the act, and not plainly showing a mere friendly gift or "treat." The acts of this defendant in furnishing beer to his boarders and to customers, with their meals and lunches, can not be regarded as such a gift. It was nothing but a device whereby he sought to escape compliance with the regulations in respect of licenses, as well as to evade the positive prohibition of the sale of liquors within a mile of the Soldiers' Home.

The judgment of the Police Court is right and must be affirmed, with costs to the appellee; and it is so ordered.

*Affirmed.*

DE FOREST v. THE UNITED STATES.

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PRACTICE; MOTION TO STRIKE OUT; DISCRETION; OBJECTIONS TO EVIDENCE; CRIMINAL LAW; BAWDY HOUSES; CHARGE TO JURY; COMMON LAW OFFENCES.

1. The allowance or refusal of a motion to strike out testimony which has been admitted without objection, is usually a matter of discretion with the trial court, which can not be reviewed on appeal; and it is only where the objection could not have been taken more seasonably that an exception is made to this rule.
2. When objection is made to the introduction of testimony the specific ground of objection should be stated, so that it may appear upon the record, and also that the other party may have an opportunity to obviate it.
3. The exclusion of testimony can not properly be assigned as error when the record fails to show any specific offer of proof was made.
4. The mere keeping of a bawdy house, where others and not the keeper commit acts of immorality, is of itself a disorderly act; and a person may be guilty of a criminal offence in so doing whose conduct may be otherwise unobjectionable or even irreproachable.
5. In a prosecution for keeping a bawdy house, it is not necessary for the Government to prove the business is conducted openly and notoriously, but it is sufficient if it be shown that the house is commonly resorted to for the commission of acts of immorality and that the proprietor knows the fact and either procures it to be done, connives at it, or does not prevent it.
6. In such a prosecution, a statement in the trial court's charge to the jury that every person is presumed to have knowledge of that which goes on in his own house, and that if it should be shown that persons continuously resort to such house for immoral purposes, the proprietor of the house would be held responsible for keeping an immoral house, is not erroneous. While the presumption of innocence continues until guilt is shown, guilt may be shown circumstantially as well as directly, and when circumstances of guilt are shown the presumption of guilt displaces the presumption of innocence.
7. An assignment of error can not be sustained when based upon an exception taken to a larger part of a charge to the jury in bulk, which part contains several plainly unexceptional propositions of law.

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8. The common law of England in all its branches both civil and criminal remains to-day the law of the District of Columbia, except where it has been repealed by express statutory enactment, or modified by inconsistent legislation, or where it has become obsolete or unsuited to our republican form of government.
9. The keeping of a bawdy house was a common law offence and is punishable as such in this District.

No. 728. Submitted November 1, 1897. Decided November 16, 1897.

IN ERROR to the Police Court of the District of Columbia.  
*Affirmed.*

The facts are sufficiently stated in the opinion.

*Messrs. Fulton & Edwards* for the plaintiff in error.

*Mr. Henry E. Davis*, United States Attorney for the District of Columbia, and *Mr. D. W. Baker*, Assistant Attorney, for the United States.

Mr. Justice MORRIS delivered the opinion of the Court:

This is the first appeal taken to this court from the Police Court of the District of Columbia under the act of Congress of March 2, 1897, authorizing such appeals. By information filed in that court the appellant was charged with keeping and maintaining a common bawdy house; and being by the verdict of a jury found guilty, she has brought her cause here upon exceptions to the rulings of the trial court in the course of the cause. Three of these exceptions have reference to the admission of evidence, six to action of the trial court in the matter of instructions to the jury, and one to the refusal of the trial court to allow a motion in arrest of judgment.

With reference to the first class of exceptions specified, it appears that at the trial an officer of the police force was called by the prosecution to testify that he had caused the arrest of the appellant upon information given to him by a former female inmate of the appellant's house; that another officer was also called in corroboration of the previous wit-

ness, and to state in detail the statements concerning the appellant's business that had been made by the female inmate referred to, who, it seems, had in the meantime left the city; and that thereupon objection was made on the part of the appellant to such statements, and a motion was made to strike them out, which the trial court declined to do. And this is here assigned as error.

But while if objection had been interposed at the proper point this testimony might possibly have been excluded as hearsay, and therefore as irrelevant, it does not follow that after it had been introduced without objection the parties have the right afterwards to go back and to move to have it stricken out. The allowance of such a motion is usually a matter of discretion with the trial court, which can not properly be reviewed on appeal. *Davis v. Patton*, 19 Md. 120; *Cecil Bank v. Heald*, 25 Md. 562. That there are cases where such motion should prevail, and where it would be error not to allow it, may be admitted. But such cases would generally be those in which the objection could not have been taken more seasonably. For it is undoubtedly a wise rule of practice that objections to the admission of testimony must be interposed seasonably; that is, ordinarily as soon as the testimony is offered and before it is adduced. *Alexander v. United States*, 138 U. S. 353; *Bull v. Schoberth*, 2 Md. 38. Otherwise, there would be no order in the introduction of testimony. And it is also a well settled rule of practice that when objection is made to the introduction of testimony the specific ground of objection should be stated, so that it may appear upon the record, and also that the other party may have an opportunity to obviate it. This rule is fortified by repeated decisions of the Supreme Court of the United States. *Toplitz v. Hedden*, 146 U. S. 252; *Noonan v. Caledonia Gold Mining Co.*, 121 U. S. 393. Neither of these rules, the one which requires objection to be interposed seasonably, and that which requires the specific ground of objection to be stated, seems to have been observed in the present instance.

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Nor are we at all certain from the circumstances of the record that the testimony here in question was absolutely inadmissible.

At a subsequent stage of the case, it was sought on behalf of the defence to elicit from a witness called on that side a statement of the reason given to her by a preceding witness who had testified for the prosecution as to the reason why she had so testified. This was excluded by the trial court, upon its appearing that no one else was present at the conversation. Whether the ground here stated for the exclusion of the proposed testimony was a correct one, we need not stop to consider. Plainly there is no error manifested here by the record. It does not appear how the proposed testimony was in any way relevant. There is no specific offer of proof, as should have been made, if it was intended to rely upon any such testimony; and it is impossible from the record to conjecture its purpose, unless it were to impeach the credibility of the preceding witness; and for that no sufficient foundation had been laid by the interrogation of the witness sought to be impeached.

At the conclusion of the testimony for the prosecution, and again at the conclusion of all the testimony, motion was made on behalf of the appellant that the jury should be directed to render a verdict in her favor, on the ground that the prosecution had failed to make out a case against her. The first motion, of course, was waived by the defendant's going into testimony; and both motions are equally untenable on the record. There was certainly enough in the case to warrant its submission to a jury; and the trial court would not have been justified upon the evidence in withdrawing it from them.

An instruction was asked by the defendant "that unless it was shown that the defendant is individually guilty of acts disorderly in themselves, the jury should find for the defendant;" and error is assigned upon its refusal. The refusal was so clearly proper that argument upon the subject

would be wholly superfluous. The mere keeping of a bawdy house, where others and not the keeper commit acts of immorality, is of itself a disorderly act; and a person may be guilty of a criminal offence in so doing whose conduct may be otherwise unobjectionable, or even irreproachable.

And a similar remark will apply to another instruction asked, to the effect "that the attendants of the house are not patrons thereof, and that any act of adultery committed by them does not *per se* constitute a bawdy house." It is the act of immorality committed by the attendants of a house so-called with the so-called patrons of it that constitute the bawdy house; and such were the acts apparently disclosed by the testimony in this case.

Error is also assigned upon the refusal of an instruction requested on behalf of the appellant, to the effect "that in order that the defendant's house should be declared a bawdy house the burden of proof is upon the Government to show that it is open, notorious and scandalous to the public, and in the event of the failure of the Government to show that such house is so open, notorious and scandalous for its disorder, then the jury should find for the defendant." And in support of this proposition are cited the cases of *Brooks v. State*, 2 Yerger (Tenn.), 482, and *King v. People*, 83 N. Y. 587. But the case of *Brooks v. State* is not in point, and that of *King v. People* maintains a proposition directly the reverse of that for which the appellant contends.

In the case of *Brooks v. State*, the indictment was for an offence, lewdness, which, in order to be indictable, must necessarily have been open, notorious and a public scandal. And to that effect are the old English authorities cited in the opinion.

The case of *King v. The People* was, like the present case, a prosecution for keeping a bawdy house; and there the Court of Appeals of the State of New York said :

"The keeping of a common bawdy or gambling house constitutes the house so kept a disorderly house and an in-

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dictable nuisance at common law. *Rex v. Dixon*, 10 Mod. 335; 1 Hawk. P. C. 603. It is a public offence for the reason that its direct tendency is to debauch and corrupt the public morals, to encourage idle and dissolute habits, and to disturb the public peace. It is not an essential element that it should be so kept that the neighborhood is disturbed by the noise, or that the immoral practices should be open to public observation." See also to the same effect the cases of *Cheek v. Commonwealth*, 79 Ky. 359, and *Thatcher v. State*, 48 Ark. 60.

Instead of their being open and notorious, in the sense of the instruction requested on behalf of the defendant, it is well known that disorderly houses of the character here indicated are generally sought to be surrounded with an air of mystery and secrecy to keep the knowledge of them from the general public; and that while they seek a certain notoriety among their patrons, or those likely to become their patrons, concealment of the true character of their nefarious business is the purpose of their managers and conductors. To ask, therefore, that these houses should not be regarded as bawdy houses, or their owners or managers as not liable to criminal prosecution for maintaining public nuisances, unless the business is conducted openly and notoriously, would be to seek to nullify the law. It is enough that the acts done are contrary to law and subversive of the public morals, that the house is commonly resorted to for the commission of such acts, and that the proprietor knows, or should in reason know, the fact, and either procures it to be done, connives at it, or does not prevent it. See *Regina v. Rice*, L. R. I. C. C. R. 21; *Commonwealth v. Wood*, 97 Mass. 225; *Commonwealth v. Gannett*, 1 Allen, 7; *McCain v. The State*, 57 Ga. 390; *Sylvester v. The State*, 42 Tex. 496.

In the next place error is assigned upon an exception taken as a whole to a large part of the charge of the court to the jury, in which, in the part to which the objection seems

to be specially directed, the trial justice stated that every person is to be presumed to have knowledge of that which goes on in his own house, and that, if it should be shown that persons continuously resort to such houses for immoral purposes, the proprietor of the house would be held responsible for keeping an immoral house. It is argued that this instruction is contrary to the fundamental principle of the criminal law that every person is to be presumed innocent until it is shown beyond reasonable doubt, that he is guilty. But we fail to find any force in this argument.

Undoubtedly the presumption of innocence continues until guilt is shown; but guilt may be shown either by direct evidence, which probably in the greatest number of cases is wholly impracticable, or by circumstances from which, according to the usual laws of reason and common experience, guilt is clearly inferable. When these circumstances are shown, the presumption of guilt displaces the presumption of innocence. The charge of the court, therefore, in this regard was certainly right and proper. But it should be added that this assignment of error could not be sustained in any event, inasmuch as the exception upon which it is based was taken to a larger part of the charge in bulk, which contains several plainly unexceptionable propositions; and it is well settled law that when exceptions are so taken and there is even one unexceptionable proposition, the exception can not be sustained. *Lincoln v. Clafin*, 7 Wall. 132; *Cooper v. Schlesinger*, 111 U. S. 140; *Railroad Co. v. Jurey*, 111 U. S. 148; *Anthony v. Railroad Co.*, 132 U. S. 172.

The appellant's last assignment of error is founded upon the refusal of the trial court to allow the motion in arrest of judgment, which motion is based upon the theory that the appellant's offence was a common law offence, and not one made such by any statute of the United States, and that there are no common law offences against the United States. And in support of this position the case of *United States v. Eaton*, 144 U. S. 677, and others are cited.

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In the case of *United States v. Eaton*, and in the several other cases therein referred to, it is stated in very broad and sweeping language, that "it is well settled law that there are no common law offences against the United States." And yet it is perfectly apparent that the statement is to be qualified with reference to the circumstances under which it was made. As against the United States regarded as coextensive with the Federal union of States and operating within the territorial limits of the States, it is undoubtedly true that there are no common law offences; for the jurisdiction there given to the United States by the Federal Constitution is distinctly and expressly restricted to the powers enumerated in the Constitution. But the statement was not intended to have application to the District of Columbia. The question as to the authority of the United States in this District is not what power has been conferred upon it, but rather what power has been inhibited to it. Subject to the limitations imposed by the Constitution itself and by the spirit of our free institutions, the United States have supreme and exclusive power over the District of Columbia, and they are not limited to the governmental powers in the Constitution specifically enumerated as defining their jurisdiction for the country at large. For the District of Columbia it is competent for the Congress of the United States to declare that the common law is to be regarded as in force, and even in the absence of express statutory enactment we should have to hold, in view of the circumstances, that the common law in its entirety, both in its civil and criminal branches, except in so far as it has been modified by statute or has been found repugnant to our conditions, is in force in the District of Columbia. But we are not left to implication in that regard.

At the time of the cession of the Territory of Columbia by the State of Maryland to the Federal Union, its law, as well as that of the rest of the States, was the common law of England, both civil and criminal, so far as that common law

was suited to our condition and was unaffected by statute. And with the common law the State of Maryland had adopted a considerable part of the statute law of England. When by the act of February 27, 1801 (2 Stat. 103), the Congress of the United States finally accepted the cession and assumed jurisdiction over the ceded District, it was specifically provided "that the laws of the State of Maryland, as they now (then) exist, shall be and continue in force in that part of the said District which was ceded by that State to the United States and by them accepted." This express enactment, if any such enactment was needed at all, was amply sufficient to continue in force and to perpetuate to the present day in the District of Columbia the common law of England as it existed in Maryland at that time, with all the existing statute legislation of the State and all the statute legislation of England that had been adopted by Maryland. And upon that theory of the law we have been conducting our affairs for nearly a hundred years. It is very true that much of the criminal branch of our common law has either become obsolete or has been obliterated by statutory enactment upon the same subject. Nevertheless, it is true that where it has not been repealed by express statutory provision, or modified by inconsistent legislation, or where it has not become obsolete or unsuited to our republican form of government, the common law of England in all its branches, both civil and criminal, remains to-day the law of the District of Columbia, and it has been repeatedly so held. See *United States v. Watkins*, 3 Cranch C. C. 441; *United States v. Marshall*, 6 Mackey, 34; *United States v. Hale*, 4 Cranch C. C. 83.

The case of *United States v. Eaton*, therefore, is not applicable to the District of Columbia, and was not intended to be applicable to it. And we are of opinion that it was not within the purview of that case to hold that there can be no common law offences against the United States in the District of Columbia.

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Syllabus.

As we have already stated, the present is the first appeal from the Police Court under the recent act of Congress. For that reason we have been more particular than was perhaps necessary in considering the questions sought to be raised by the record before us, inasmuch as the early rulings under the act must to a great extent determine the future practice thereunder.

We find no error in the rulings of the Police Court in this case; and the judgment of that court in the premises must therefore be *affirmed*. *And it is so ordered.*

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MARMION v. McCLELLAN.

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McCLELLAN v. MARMION.

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ACCOUNTING; MUTUAL ACCOUNTS; PRESUMPTIONS; EQUITY PRACTICE; ANSWER AS EVIDENCE; EVIDENCE; TRUSTS AND TRUSTEES; AUDITOR'S REPORTS, EXCEPTIONS TO; INTEREST.

1. Where cross demands or mutual accounts or dealings exist between parties, and one gives to the other a note or security for the payment of a definite amount growing out of the transactions, or some of them, the presumption arises that the amount for which the note or security is given is the balance due the party to whom it is given upon a statement or settlement of the mutual accounts existing between them at the time, including all the items and demands which each then had against the other; and the burden is upon the party controverting such presumption to prove by clear and satisfactory evidence, not only that some items were omitted from such accounting, but also that they were omitted by the mutual mistake of both parties or the fraud of the party to whom the note or security is given.
2. New and affirmative matter set up in an answer to a bill in equity and not responsive to the allegations of the bill, is not evidence in favor of the defendant.

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3. A defendant in equity who claims credit for sums alleged to be due him from a complainant executor, for medical services and board furnished the decedent, is an incompetent witness under Sec. 858, R. S. U. S., as it involves his testifying as to transactions with and statements of a decedent.
4. A trustee is incompetent to purchase the property he holds in trust from his *cestui que trust*; and although no conventional trust relations may exist between parties, yet if a relation of confidence exists, the person in whom confidence is reposed will not be permitted to derive any personal advantage from dealing with the property of the other; and any sale by the party reposing the trust to the other will be avoidable at the election of the former, unless he acted with a knowledge of all the material facts affecting the transaction and fully understood he was disposing of the property, and received, approximately at least, the full value thereof.
5. Where an auditor's report charges a given sum against one of the parties with interest from a certain date, an exception to the allowance of the sum awarded raises the question as to whether the interest was allowed from the proper date.
6. Where in a proceeding in equity for an accounting it is determined that such a relation of confidence existed between the complainant's decedent and the defendant that a profit made by the defendant on a purchase of property from the decedent during her life time belongs to her estate, the defendant may properly be relieved of paying interest prior to the decree requiring him to account for such profit.

Nos. 501 and 502. Submitted May 5, 1897. Decided December 7, 1897.

HEARING on an appeal and a cross-appeal from a decree in a suit for an accounting. *Affirmed.*

The Court in its opinion stated the case as follows:

These are cross-appeals from a decree of the Supreme Court of this District, made upon a bill and cross-bill. The original bill was exhibited by Elizabeth A. Walker against William V. Marmion and others. Miss Walker died before final decree in the court below, and the cause was revived by consent in the name of John McClellan, her executor.

The original bill charged that the said Marmion had received, as the complainant's trustee, all her estate, consisting of her distributive share in the estate of her mother

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and the proceeds of sale of her interest in certain real estate in the city of Washington, and that he had failed to give her any satisfactory account of the investments thereof or of the profits therefrom, but that on the 2d day of May, 1887, he executed a deed of trust to Joseph G. McClellan conveying lot three (3) and a part of lot four (4), in square one hundred and twenty-six (126), in the city of Washington, known as premises 1719 I street, in which it is recited that he then held in trust for the sole use and benefit of the complainant the sum of thirty-eight thousand dollars in three per cent. United States Government bonds, to secure the return whereof said deed was given, and delivered said deed to complainant together with a note bearing the same date made by the said Marmion to her order for sixty-seven hundred dollars, payable one year after date with interest at three per centum per annum, with the request that she should not record said deed, but that she would keep the transaction secret, with which request she complied for a time, until she learned that on the 4th day of December, 1888, there was recorded in the Land Records of the said District a deed of trust from said Marmion for the same property, to William W. Boarman, trustee, to secure George C. Boarman the sum of thirty-eight thousand dollars, whereupon, on the 10th day of December, 1888, she caused the said deed of trust to the said McClellan to be recorded in the said Land Records, and the bill alleged that the deed of trust to Boarman was without consideration and void, and prayed that said Marmion should be required to account for said moneys, that the amount justly due from him to her should be ascertained, and that the deed of trust to McClellan should be declared a security for the payment thereof, and that the deed of trust to Boarman should be declared void as to her.

The defendant Marmion, in his answer to the original bill, denies that he was the trustee of Miss Walker, but admits that he received \$5,000, her distributive share in her

mother's estate, and \$2,300, the purchase money for her interest in real estate, to invest for her, but denies that she reposed any confidence or trust in him in relation thereto, but avers that he invested the same as she directed, and collected and paid the interest thereon to her periodically as the same fell due, and that he had also collected and received the principal and paid portions thereof to her from time to time, and that she was indebted to him for board and medical attendance in a sum in excess of the balance of the principal that would otherwise be due her from him on account of said moneys. He admits the giving of the deed of trust to McClellan and the execution and delivery of the note of \$6,700 to her, but denies that he owed her anything at that time, and says that the whole supposed indebtedness was fictitious, as Miss Walker well knew, and that it was given for a purpose of which she was cognizant, with an understanding that the said deed of trust was not to be recorded except upon the happening of a certain emergency, which has never arisen, and that the \$6,700 note was delivered to her to give color to the claim that he was indebted to her in the sum recited in the deed if the occasion therefor should arise. He also admitted that the said deed of trust to Boarman was for a fictitious indebtedness.

Having answered the original bill, the said Marmion filed his cross-bill in the cause against the said Walker and Joseph G. McClellan, trustee, alleging that at the time of the execution of the deed of trust by him to said McClellan for the apparent purpose of securing the said Walker, he was not indebted to her in any sum, but that upon a proper settlement of the accounts between them, she would have been indebted to him; that the said deed of trust had been recorded in violation of an understanding between him and Miss Walker at the time it was delivered to her, and prayed that the accounts between them should be settled, and the said deed of trust should be cancelled and delivered up.

William W. Boarman, trustee, and George C. Boarman,

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answered the original bill admitting that the supposed indebtedness apparently secured by the deed of trust to W. W. Boarman, was fictitious, the said Geo. C. Boarman answering that he knew nothing of the deed or note therein mentioned, and did not know of their existence until several days after the deed was recorded, and that he had advanced said Marmion no money, and claimed no right or benefit under said deed.

After the revival of the case by agreement in the name of John McClellan, executor of Elizabeth A. Walker, he filed an answer denying the allegations of the cross-bill which were inconsistent with the allegations of the original bill. Issue was joined upon the several answers, and evidence was taken by both the principal parties litigant.

The following facts appearing by the pleadings and evidence are conceded or not seriously contested, to wit:

That the said Marmion, on the 1st day of July, 1880, married Caroline W. McClellan, a niece of the said Elizabeth A. Walker, and granddaughter of one Caroline H. Walker, the said Elizabeth being a daughter of the last named; that at the time of said marriage the three ladies mentioned lived together, and had for some time prior thereto, in house No. 1722 I street in this city; that the said Caroline H. Walker died on the 5th day of July, 1880, and the defendant and wife in the latter part of that month visited Capon Springs, and the said Elizabeth A. Walker accompanied them as their guest, and in September following she went to live with them in the residence No. 1722 I street, of which she was the owner of an undivided one-fourth interest, and Mrs. Marmion of an undivided one-twelfth interest, the remaining two-thirds being owned by the other heirs of Wm. Mc. Walker; that the said Elizabeth A. Walker continued to reside with said Marmion and live in his family from that time until about December, 1888, upon what terms or particular arrangement does not satisfactorily appear, and is not material to the decision of

this case; that she was infirm and quite an invalid when she commenced to live with Marmion and gradually and continually grew more infirm; that the said Marmion, who is a physician, claims to have treated her professionally during all this time; that in February, 1881, the said Marmion received from her \$5,000, being her distributive share of her mother's estate, to invest and manage for her, the greater part of which he did invest in United States Government bonds and deposited the residue to her credit in bank, the bonds being registered in his name and remaining in his possession; that in June, 1881, the said Marmion being informed by John McClellan, the agent of the owners of 1722 I street, except Mrs. Marmion and Miss Walker, that Calderon Carlisle had offered to purchase the two-thirds interest in the property at the rate of \$9,000 for the whole, immediately offered to give \$100 more, which offer being reported by McClellan to Mr. Carlisle, the latter immediately offered \$9,200, which McClellan accepted without further consultation with Marmion, and on the 21st day of June, 1881, a conveyance was made to Mrs. Carlisle of the two-thirds interest represented by McClellan, at the rate of \$9,200 for the whole; that on the 22d day of June, 1881, Marmion wrote Carlisle as follows:

"Mr. Carlisle.

"Dear Sir: I understand from Jack that he has sold you the two-thirds interest in this house which he represented. Miss Walker tells me that Jack said 'you would,' he thought, 'sell your interest to me.' If such be the case, I should like to purchase it, and my only reason for writing at this time is that I want to build at once. Will you kindly let me know your price, provided you are willing to sell?

"Very respect,

W. V. MARMION.

"1722 I street, June 22, 1881."

And on the 24th of the same month received the following reply from Mr. Carlisle:

"Under the peculiar circumstances of this case I was

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induced to give for the two-thirds bought at the rate of \$9,200 for the whole property just \$200 more than Jack and Mr. F. believed to be its full value, and \$1,200 more than Mr. Wag.'s estimate of its full value. Neither my wife nor I have the least desire to sell. On the contrary, I wish to purchase for her your wife's interest and that of Miss Walker, and I am ready immediately to give full value for these interests."

That on the 25th day of June, 1881, the said Marmion and his wife conveyed to the said Elizabeth A. Walker the one-twelfth interest of Mrs. Marmion in said real estate, the consideration recited in the deed being \$766.66, and on the same day Miss Walker conveyed the interest thus vested in her and her own one-fourth interest in said real estate to said Marmion, the consideration mentioned in said last-mentioned conveyance being \$3,066.66, which was at the rate of \$9,200 for the whole property, and \$2,300 for the interest of Miss Walker, but in fact no money passed between the parties to said conveyance at the time thereof; that some time subsequently the said Marmion invested the greater part of the amount of \$2,300 in United States bonds, registered in his own name and retained in his possession, and deposited the balance of the \$2,300 to the credit of Miss Walker with her bankers; that on the 6th day of September, 1881, Marmion conveyed to Mrs. Carlisle the one-third interest in 1722 I street vested in him by virtue of the deed of Miss Walker to him for the consideration of \$4,366, which was at the rate of \$13,098 for the whole property and \$3,274.50 for the one-fourth interest of Miss Walker; that the bonds purchased by Marmion with the \$5,000 and \$2,300 were of several issues and bore interest at different rates, the investment being changed from time to time to other issues, as some of the bonds were called in by the Government, until finally all of the investment was in 3 per centum bonds, and the face value thereof was \$6,700, and some time in the year 1885 (the exact date does not appear

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in the evidence) Marmion gave Miss Walker his note for \$6,700; that he collected the interest on these bonds from the Government, it being paid by checks to his order, and paid it over to Miss Walker by his own check to her order, or to bearer deposited in her bank account; that these last mentioned 3 per centum bonds were called in from time to time, the last being called in in 1887 or 1888, but when so called in no part of the principal was paid to Miss Walker, but Marmion continued to pay her the interest, and on the 2d day of May, 1887, he gave her his note in the following language:

"6,700.00.

WASHINGTON, D. C., May 2, 1887.

"Twelve months after date I promise to pay to the order of Elizabeth Agg Walker six thousand and seven hundred dollars, at Riggs' bank, with interest, at the rate of 3 per cent. per annum, from date until paid, value received.

"No. four.

W. V. MARMION.

"Due ——— ———.

"This note in lieu of and to take place of that given in 1885.

"(Endorsed:) This note to be extended until May 3rd, 1889. E. A. Walker."

And on the same day he executed a deed of trust to Joseph G. McClellan, reciting therein that he held in trust for the sole use and benefit of the said Elizabeth A. Walker the sum of thirty-eight thousand dollars in three per centum United States Government bonds, and that to secure to her the return of said bonds and the payment of the interest thereon quarterly he had executed his four promissory notes, two for the sum of ten thousand dollars each, one for eleven thousand three hundred dollars, and one for six thousand seven hundred dollars, each bearing interest at the rate of three per centum per annum payable quarterly, and conveying to said trustee to secure the payment of said notes the real estate known as 1719 I street in the city of Washington, and delivered said note for \$6,700 and the

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deed of trust to her, but did not deliver to her the other notes, with the request that said deed be not recorded.

On the 27th day of January, 1888, Marmion prepared, and at his request Miss Walker executed and delivered to him the following paper:

"WASHINGTON, D. C., January 27, 1888.

"William V. Marmion has held under his name, but in trust for me, six thousand and seven hundred dollars in U. S. 3 per cent. bonds for the past six years, upon which the interest has been duly paid by him. In May, 1888, he gave me his note at twelve months for six thousand and seven hundred dollars to secure the payment to me of this trust fund. Up to this date the said William V. Marmion has, at various times, paid me sums upon said note, which in the aggregate amount to fourteen hundred dollars, the receipt whereof is hereby duly acknowledged, and I hereby declare that this trust fund as aforesaid, less fourteen hundred dollars which have been paid upon it as above mentioned, is the sole and only indebtedness of the said William V. Marmion to me; or, in other words, that at this date that he owes me a balance of five thousand three hundred dollars; and I hereby for value received, extend the time for the payment of said balance upon note from May 2d, 1888, to November 2d, 1889.

"In testimony whereof witness my hand and seal the day and date above written.

"(Signed)

E. A. WALKER. [Seal.]

"Witness:

"(Signed) ELEN DEDGS."

On the 9th of August, 1888, Miss Walker being away from Washington, Marmion wrote and enclosed to her a check for \$200, and 25 cents in stamps, saying in the letter that \$50.25 was for interest and \$150 was to be credited on the note.

On the 20th day of October, 1888, Marmion prepared and requested Miss Walker to sign the following paper:

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"I, Elizabeth Agg Walker, of Washington, D. C., hereby declare that the promissory notes, numbered 1, 2 and 3, for the following sums, to wit, numbers 1 and 2 being for ten thousand dollars each, and number 3 being for eleven thousand and three hundred dollars, all of which said notes were made by William V. Marmion, payable to me one year after date, at the rate of three per cent. interest, interest payable quarterly, the date of payment being May 2d, 1888, the notes being dated May 2d, 1887, the said notes being described in a certain deed of trust executed by the said William V. Marmion to Joseph Gales McClellan, of St. Paul, Minnesota, as notes Nos. 1, 2 and 3 have been cancelled and fully paid and returned to the said William V. Marmion; and I further declare that the only claim which I hold against the said William V. Marmion or his property, as described in said deed, is for the unpaid balance due upon note described in said deed of trust as note No. 4, payable May 2, 1888, and extended to May 2, 1889.

"In testimony whereof witness my hand and seal this twentieth day of October, 1888.

"———. [Seal.]"

But she did not sign it.

In the latter part of the year 1888 differences arose between Marmion and Miss Walker, and she left his house, and on the 4th day of December a deed of trust on premises 1719 I street from Marmion to W. W. Boarman, trustee, to secure Geo. C. Boarman \$38,000, was recorded, and on the 10th day of December, 1888, Miss Walker caused the deed of trust to McClellan to be recorded.

On the 2d day of April, 1895, after a hearing upon the pleadings and evidence, the court below decreed the deed of trust from Marmion to Boarman to be void, and that said Marmion was trustee for said Walker, and referred the case to the auditor with instructions to state the account of the said trustee in relation to the funds of said Walker which had come to his hands, and in said accounting to

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charge said trustee with the sum of \$3,274.50, the amount received by him from Mrs. Carlisle for the interest of said Walker in the real estate known as 1722 I street, instead of \$2,300, for which sum Marmion claimed he had purchased the interest of Miss Walker.

In stating the account the auditor treated the giving of the note in 1885, and the renewal thereof on the 2d day of May, 1887, and the giving of the deed of trust to secure it on the same day, and the preparation by him and taking from Miss Walker of the paper of the 27th of January, 1888, stating the amount still due on said note and extending the time for payment of the balance, as the equivalent of an account stated, and allowed Marmion credit for \$1,400 recited in that paper as having been paid by him, and \$1,700 in addition, which he had paid on that note after that date, and the sum of \$450 for nine month's board of Miss Walker and maid after January 27, 1888, and rejected all of the demand of Marmion for board prior to that date, and all of his claim for medical attention and services. The auditor also charged Marmion in said account with \$974.50, the difference between what he received from Miss Walker's interest in the house No. 1722 I street and the \$2,300, with interest thereon from the 7th day of July, 1881.

Marmion's counsel excepted to the auditor's report on grounds sufficiently comprehensive to raise all the questions raised by his answer and cross-bill. At the final hearing of the cause, the court below sustained the exception to the allowance of only \$450 for nine months' board, and allowed \$550 in lieu thereof for eleven months' board, on the ground that the auditor had made a clerical error in the number of months that Miss Walker and maid boarded with Marmion after the 27th day of January, 1888, and also corrected the auditor's report in relation to the allowance of interest on the \$974.50 from July 7, 1881, and allowed interest only from the 2d day of April, 1895, the date of the interlocutory decree in this cause. In all other particulars the court con-

firmed the auditor's report, and decreed that there was due from Marmion to the executor of Miss Walker the sum of \$4,024.50 with interest on \$3,050, the balance due on said note from December 10, 1888, to November 2, 1889, at 3 per cent. and at 6 per cent. thereafter until paid, and interest on \$974.50 from the 2d day of April, 1895, and that the deed of trust from Marmion to McClellan of May 2, 1887, is a security for the payment thereof. From this decree both parties appealed, and the solicitors for Marmion assigned the following errors in said decree:

"1. The court below erred in charging the defendant Marmion with the sum of \$3,274.50 as the amount of Elizabeth A. Walker's interest in the proceeds of the sale of premises No. 1722 I street, northwest, instead of charging him with only \$2,300.00 as the amount of her said interest.

"2. The court below erred in refusing to allow the defendant Marmion's charge against the complainant Elizabeth A. Walker for board and lodging at the rate of \$35.00 per month from August, 1881, to December, 1888, instead of allowing him only \$550 for such board and lodging.

"3. The court below erred in refusing to allow the defendant Marmion credit for his charges against the complainant Elizabeth A. Walker for the medical services rendered to her by him at her request."

And the counsel for McClellan, executor, assigned as error the refusal of the court to allow interest on the \$974.50 from the time the money was received by Marmion.

*Mr. George E. Hamilton* and *Mr. M. J. Colbert* for the appellant Marmion:

1. There is no proof that, with respect to the real estate referred to, Marmion occupied to Miss Walker the relation of trustee. There is no hint of any such relation in the record outside of the allegations contained in the original bill, which do not constitute proof of any fact. There is no proof anywhere that with respect to Miss Walker's interest

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in the real estate Marmion was ever her trustee, and hence it must follow that he was just as competent to purchase from Miss Walker as was Mr. Carlisle. "The trustee may purchase of the *cestui que trust* property not embraced in the trust fund, care being taken that the influence of the relation does not affect the transaction." 1 Perry on Trusts (3d Ed.), 238; *Eldridge v. Smith*, 34 Vt. 484.

In this country at least, it is well settled that a trustee may purchase from his *cestui que trust*, if no advantage be taken by the trustee by misrepresentation, concealment or undue influence, and the *cestui que trust* understood the nature and effect of the transaction. *Brown v. Cowell*, 116 Mass. 465; *Jennison v. Hopgood*, 7 Pick. 1; *Farnham v. Brooks*, 9 Pick. 212. The trustee is not forbidden to buy directly of his *cestui que trust*, but the burden is on him to show a full, fair and sufficient consideration, and it must appear that the *cestui que trust* had power to sell, and had the fullest information concerning the transaction. 27 Am. & Eng. Encyc. 213, and cases cited; 1 Perry on Trusts (3d Ed.), p. 238; *Smith v. Townshend*, 27 Md. 368; *Breckett v. Tyler*, 3 MacArthur, 319; *Spencer's Appeal*, 80 Pa. St. 317. It appears from the complainant's own evidence that the price paid by Marmion was the full value of the property, and it further appears that Miss Walker had full knowledge of the negotiations between her nephew, and Mr. Carlisle, and that she sold to Marmion with full knowledge of all the facts.

Another reason why this portion of the decree is erroneous and should be reversed lies in the fact that the view taken by the auditor and also by the court below, was that the various papers set out in the record were the equivalent of an account stated between the parties, and that the trust fund in Marmion's hands was the sum of \$6,700, which sum is arrived at on the theory that the purchase price paid to Miss Walker by Marmion was \$2,300 only. If these various papers and agreements between the parties constituted

an account stated between the parties, they must constitute an account stated for all purposes and not merely for one purpose.

2. It is objected on the part of the complainant that after the death of Miss Walker, and when the cause stood revived in the name of her executor, Dr. Marmion was not a competent witness as to transactions between himself and the deceased. Conceding this to be so, Marmion's answer was filed in the lifetime of Miss Walker and has the force and effect of evidence in his favor. It is true that the bill waives an answer under oath, but the right to answer under oath and thus to compel the complainant to overcome the sworn answer by the testimony of more than a single witness is a right of which the defendant can not be deprived. Story's Eq. Pl. (9th Ed.), par. 874, note *a*; *Clements v. Moore*, 6 Wall. 299; *Brown v. Buckley*, 14 N. J. Eq., p. 306.

3. The nature of an account stated is that the parties consider the claims and strike a balance, after which the vouchers may be destroyed and the balance may not be disputed. It is an agreement by both parties that the items are true. There must be a mutual examination of the claim of each other by the parties, and a mutual agreement as to the correctness of the allowance or disallowance of the respective claims. 6 Wait's Actions and Defenses, 424. Assuming that the \$6,700.00 note was intended to be a valid security in the hands of Miss Walker, the giving of such a note would only be *prima facie* evidence of a settlement and would still be open to explanation. *Morton v. Rogers*, 14 Wendell, 576.

*Mr. William G. Johnson* for the appellant McClellan :

1. If, as claimed by the complainant, relations of peculiar trust and confidence subsisted between the complainant and the defendant, and by reason of those relations he acquired the possession and control of her property; if, in addition to these circumstances, she was a helpless invalid, and he acted as her physician, then the situation was such as, under

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the law, precluded him from making any profit or advantage out of her estate, or any part of it. *Huguenin v. Beaseley*, 2 Wh. & Tud. Ld. Cases in Eq. 1156, and cases cited in notes; *Michoud v. Girod*, 4 How. 503, 554; *Brooks v. Martin*, 2 Wall. 70; Perry on Trusts, Secs. 194-210; Story's Eq. Jur., Secs. 322, 323; 2 Sugden on Vend. (7th Am. Ed.), Sec. 3, Par. 1, p. 362.

Where a technical trust is shown to exist, the law presumes confidence, influence and power in the trustee from that circumstance alone and dispenses with other proof. Where no technical trust exists, the confidence, influence and power must be proved by satisfactory evidence; but when proved by whatever means, the result is the same.

The relation of Marmion to the complainant as already shown was such as to render this transaction with the complainant *prima facie* fraudulent in law, and in order to sustain it, if it could be sustained at all, the burden was upon him to show that it was in all respects fair, and that the complainant was fully advised as to all material facts and circumstances known to him. Instead of this there is added to the transaction the elements of concealment, influence and disadvantage. The inequitable character of the transaction which the law presumes from the relations between the parties is intensified and made fraudulent in fact by the testimony of the defendant as to the manner in which the transaction was carried out.

2. Interest upon this sum of \$974.50 should have been allowed. If, as the court adjudged, Marmion was bound to account to the complainant for that sum of money, he was undoubtedly chargeable with interest upon it from the time that he received it, because he had had this sum of money adjudged to belong to the complainant, and had the use of it during all that time, it being the property of the complainant, and her right to the interest followed as a necessary consequence. Moreover, the report of the auditor was not excepted to by the defendant Marmion in this particu-

lar. It is a well established principle of chancery practice that all items of the auditor's report not excepted to within the time limited for filing exceptions are binding alike upon parties and court. *Osborn v. Gheen*, 5 Mack. 193.

Mr. Justice COLE, of the Supreme Court of the District of Columbia, who sat with the court on the hearing of this cause in the place of Mr. Justice MORRIS, delivered the opinion of the Court:

It will be most convenient to first consider the question arising upon the second and third assignments or error by Marmion's counsel, which is that it was error to refuse Marmion credit for the amounts claimed by him for the board of Miss Walker, and for medical attendance to her prior to the 27th day of January, 1888.

The giving of the note for \$6,700 by Marmion to Miss Walker in 1885, the renewal of it on the 2d day of May, 1887, and the giving of a deed of trust on the last mentioned date to secure it, and the preparation and acceptance by him of the written acknowledgment by Miss Walker of the 27th day of January, 1888, of the receipt of certain payments on said note, and stating the balance due thereon at that date, and extending the time for the payment thereof, was the equivalent of an account stated between these parties at each of the dates above mentioned.

Where cross demands or mutual accounts or dealings exist between parties, and the one party gives to the other a note or security for the payment of a definite amount growing out of said accounts or transactions, or some of them, the presumption arises that the amount for which such note or security is given is the balance due the party to whom it is given upon a statement or settlement of the mutual accounts existing between them at the time, including all the items or demands which each then had against the other, and the burden is upon the party controverting such presumption to prove by clear and satisfactory evidence, not only that

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some items were omitted from said accounting, but also that they were omitted by the mutual mistake of both parties or the fraud of the party to whom the note or security is given. *Chappedelaine v. Dechenaue*, 4 Cranch, 306; *Lake v. Tyson*, 6 N. Y. 461; *DeFreest v. Bloomingdale*, 5 Denio, 304; *Maybury v. Berkery*, 102 Mich. 126; *Rice's Ev.*, p. 103; 1 *Taylor Ev.*, Sec. 124; *Gaskin v. Wells and others*, 15 Ind. 253.

In the case of *DeFreest v. Bloomingdale et al.*, executors of *Philip DeFreest, deceased*, a father devised to his two sons, the plaintiff and the defendant's testator, a farm on condition that they should support their mother during her life. The plaintiff supported her for seven years and then brought this suit to recover half the expense thereof. The defendants proved that on the 27th of March, 1839, the plaintiff gave his note to the defendant's testator for \$100, which came to their hands with other papers and was subsequently paid by plaintiff. The referee allowed the plaintiff one-half of the value of the board for the seven years, more than three of which were prior to the giving of the note. Upon a motion to set aside the report of the referee, the court delivered the following opinion, by Beardsley, Ch. J.:

"As the referee allowed the plaintiff for more than seven years' board of the widow DeFreest, and there was no pretence of a right to recover for such board after January, 1843, the time for which the allowance was made must have commenced as early as 1836. This was some three years before the plaintiff gave his promissory note to the defendants' testator for \$100 and interest. It does not appear what this note was given for, and, unexplained, the giving of the note was *prima facie* evidence that nothing remained due to the maker of the note from the person to whom it was delivered. This is a reasonable inference from the fact of giving a note, and the principle applies with full force to this case, for there was nothing to show on what consideration the note was given, or to rebut the ordinary presumption, that the demands between the parties were then

liquidated and the note made for the balance found to be due from the maker. It is highly improbable that the plaintiff would have given his note to a person who was then indebted to him in a sum, according to this report, much beyond the amount of the note, and until some explanation shall be given the note is decisive evidence against any such claim. If an explanation can be given it must come from the plaintiff, for the presumption is that the note was given for a balance admitted to be due. Without examining other points made, the one already stated is decisive against the report and it must be set aside."

The present case is a much stronger one for the presumption of a settlement than the one in Denio. There it did not appear what the consideration for the note was. In this case it clearly appears that the note was given for funds of Miss Walker which Marmion held in trust for her. If he had any demands against her at either of the dates above mentioned, the presumption is that they were deducted from Marmion's total liability, leaving the balance as acknowledged by the notes and the paper granting extension of time for payment. If it could be said that the evidence shows that nothing was deducted for board and medical attendance, the presumption would still remain that these had been arranged or settled in some other way.

In the case of *Chappedelaine et al. v. Dechenaue*, above referred to, Chief Justice Marshall, speaking of the effect of a stated account, uses the following language:

"The stated account is pleaded in bar of so much of the bill as requires that the subject should again be opened, and the particular errors assigned, with the exception of one in the addition, are denied in the answer.

"That the plea in bar must be sustained, except so far as it may be in the power of the representatives of Chappedelaine to show clearly that errors have been committed, is a proposition about which no member of the court has doubted for an instant. No practice could be more dangerous than

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that of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful or by only probable testimony. But if palpable errors be shown, errors which can not be misunderstood, the settlement must so far be considered as made upon absolute mistake or imposition, and ought not to be obligatory on the injured party or his representatives, because such items can not be supposed to have received his assent. The whole labor or proof lies upon the party objecting to the account, and errors which he does not plainly establish can not be supposed to exist."

The situation in this case is similar to the one in the case from which the foregoing quotation is made, the main difference being that in that case the stated account was attacked by the bill, while in this case it is assailed by the answer. Marmion's answer admits the giving of the note and security and the acknowledgment by him of a balance due on the 27th day of January, 1888, and seeks to avoid the presumption arising therefrom by the allegation of new or affirmative matter. Counsel for Marmion contended that his answer claiming the right to charge against the note his bills for board and medical attendance occurring prior to January 27, 1888, is evidence in his favor. But the conclusive answer to that argument is that that part of the answer is affirmative matter and is not responsive to the allegations of the bill, which is necessary in order to render the statements of an answer evidence for the defendant. Nor is that allegation of the answer supported by any competent evidence. Marmion is the only witness who testifies tending to prove that his bills for board and medical attendance were not settled, adjusted or paid at or before the times of the giving by him of the notes, and the making of the acknowledgment of the 27th of January, 1888. But he is an incompetent witness to prove such facts in this case, as it involves his testifying against an executor as to transactions with and statements by the testatrix, which would be in violation of both the letter and spirit of Sec-

tion 858 of the Revised Statutes of the United States, relating to the incompetency as witnesses of parties to a suit.

The testimony of Lydia Marmion, tending to prove the admission of Miss Walker that she was to pay Dr. Marmion board, does not reach the point, as it has no tendency to rebut the presumption arising from the settlements. But if Marmion were a competent witness, his testimony does not go far enough to impeach the account stated. It only tends to prove that the items of board and medical attendance were not included in the settlement. It does not tend to show that they were left out either through a mutual mistake of the parties or the fraud of Miss Walker, one of which is necessary to impeach the balance admitted. He knew of those items at the time, and the presumption is that if they were justly due him at the time of those settlements he would have insisted upon their going in reduction of liquidation of the balance due from him, and this presumption is conclusive upon him until he proves not only that they were not considered in those settlements, but some reasonable grounds why they were not, consistent with their being due him at the time. There was no error, therefore, in the action of the court below in rejecting the claim of Marmion for board and medical attendance prior to the 27th day of January, 1888. Miss Walker remained in the family of Dr. Marmion, with her maid, for eleven months subsequent to the last mentioned date, and he was allowed \$550 therefor; and there is no error assigned upon that action of the court. But it is contended that there was error in not allowing Dr. Marmion for medical attention after the last named date. The item of his bill is \$1,200 for medical and surgical services from January 1, 1888, to September 20, 1888. The evidence in relation to it is exceedingly meagre and unsatisfactory. The conclusion of the auditor in relation to this charge is as follows:

“The claim of \$1,200 for medical and surgical services rendered from January 1st, 1888, to September 20th, 1888, is not sufficiently explained in the proof. I am not able to

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estimate the character, extent, or value of the services. That Miss Walker, in her condition, required some assistance and attention beyond that of her maid, and that he rendered such service, appears in the testimony of the defendant Marmion; but whether such as he describes comes within the designation of medical or surgical service, and, if so, the extent and value of the same, are matters left uncertain."

This characterization of the evidence met the approval of the court below, in which we concur, and we think there was no error in rejecting that item.

The remaining assignment of error made by the attorneys for Marmion is that the court erred in charging him with the sum of \$974.50, the difference between \$2,300, the sum for which Marmion claims to have purchased Miss Walker's interest in premises 1722 I street, and the sum of \$3,274.50, the amount which Mrs. Carlisle paid Marmion therefor.

It is contended by counsel for the complainant in the original bill that at the time of the conveyance by Miss Walker to Marmion a relation of confidence existed between them which, if it did not totally disable the latter in law from purchasing the property from the former, rendered the sale voidable, unless it was clearly shown that she was fully informed of all material facts and circumstances affecting the value of her interest in said property, and that she fully understood that she was making a sale to Marmion and intended to do so, and that the price received by her very nearly approximated the full value thereof at the time, and they insist that the elements necessary to make it a valid sale in the contemplation of a court of equity are wanting.

It is undoubtedly the doctrine of equity that where a conventional trust relation exists between parties, the trustee is incompetent in law to take the property which is the subject of the trust by purchase from the *cestui que trust*,

and that although no conventional trust relation may exist between the parties, yet if there be in fact a relation of confidence, the person in whom the confidence is reposed will not be permitted to derive any personal advantage from dealing with the property of the other party, and that any sale by the party reposing the trust, to the other, will be voidable at the election of the former, unless he acted with a knowledge of all the material facts affecting the transaction, and fully understood that he was disposing of his property, and received approximately, at least, the full value thereof. The latter part of the foregoing proposition is stated by the Supreme Court in the case of *Brooks v. Martin*, 2 Wallace, 70, in the following language:

“If the parties are to be regarded in this transaction as holding towards each other no different relations from those which ordinarily attend buyer and seller, and as therefore under no special obligation to deal conscientiously with each other, we are satisfied that no such fraud is proven as would justify a court in setting aside an executed contract. But there *are* relations of trust and confidence which one man may occupy towards another, *either personally* or in regard to the particular property which is the subject of the contract, which impose upon him a special and peculiar obligation to deal with the other person towards whom he stands so related, with a candor, a fairness and a refusal to avail himself of any advantage of superior information or other favorable circumstance not required by courts of justice in the usual business transactions of life.”

The following authorities also support the general rule above stated: Perry on Trusts, Secs. 194–210; Story's Eq. Jur., Secs. 322, 323; *Michoud v. Girod*, 4 How. 503; *Rankin v. Porter*, 7 Watts. 390; *Huguenin v. Basely*, 2 Wh. & Tud. Leading Cases in Equity, and other cases referred to in the notes to that case; *Smith v. Kay*, 7 H. L. 779.

Counsel for Marmion contend that the foregoing rule does not apply to the transaction in question as no relation

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of trust existed at the time in relation to Miss Walker's interest in the real estate in question. But according to the above cited authorities, the rule applies to all transactions between the parties where a relation of confidence exists generally. Does the evidence in this case establish such a relation?

The physical condition of Miss Walker at and about the time in question is stated by Dr. Marmion in his testimony in the following language: "From 1879 to about 1881 she was fairly active, but delicate and a considerable sufferer from rheumatism. From 1881 on she failed slowly but surely, and became unable to go up and down stairs, and could not use her hands much." Dr. Rosse, a witness introduced by the defendant in the original bill, speaking of her condition in 1880 and 1881 and afterwards, said that "she was in a condition to be dependent upon those around her." The only reasonable inference deducible from this and other like evidence in the record is that from about the time she went to live in Dr. Marmion's family she was not in a condition to give much active attention to business such as selling real estate and making investments of money. It is not shown that she had ever had any experience in transacting such business. She was, therefore, in a condition to desire, if not require, some one in whom she could confide to transact her business for her. Defendant was the husband of her niece, in whose family she was living, and it was natural that she should turn to him for advice, and especially so as she knew him to be a man of considerable means, accustomed to business transactions. That she did so with confidence in him is shown from the fact that when she received the \$5,000 from her mother's estate in February, 1881, she immediately handed it to him with a request that he invest it as he deemed best, taking and asking no receipt, note or security. That Marmion knew that she trusted him implicitly appears from the fact that he offered her no note or security for the money, but invested it in

bonds registered in his own name and retained them in his possession, giving her no note or security therefor. This was the posture of affairs, when in June, 1881, the transaction in question occurred. Marmion's version of the transaction is that he purchased her interest in the property at \$2,300. He admits that he paid no purchase money at the time, but says that a month or more subsequently he invested the amount in bonds for her, but in his own name. But whether Miss Walker understood it as a sale, or as a transfer of her interest to him to be sold for her benefit, the transaction in itself manifests her unbounded confidence in him, as she conveyed to him all the residue of her then remaining estate without receiving one cent in value, or any evidence that she was entitled to receive anything, while the deed she executed was conclusive evidence against her right to demand anything of him on account of that interest, in the absence of any explanation of the transaction. Stronger evidence of complete trust reposed by one person in another than is afforded by this transaction can hardly be imagined.

These admitted facts bring the transaction fully within the rule under consideration, and subject it to the test stated by Mr. Justice Miller in the case of *Brooks v. Martin*, *supra*, in the following language:

"We lay down, then, as applicable to the case before us, and to all others of like character, that in order to sustain a sale, it must be made to appear, first, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased; and, second, that all the information in possession of the purchaser, which was necessary to enable the seller to form a sound judgment of the value of what he sold, should have been communicated by the former to the latter."

And all the authorities agree that the burden is upon the purchaser to establish these facts by clear and satisfactory evidence. Are those facts established in this case?

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Marmion claims to have purchased from Miss Walker, on the 25th day of June, 1881, for \$2,300, for her interest, which was at the rate of \$9,200 for the whole, and at the rate at which Carlisle had purchased the interests of the other joint owners four days previous.

That Marmion considered the property worth more than \$9,200 at the time appears from the occurrences both prior and subsequent to the conveyance to him by Miss Walker. When he was informed by McClellan that Carlisle had made an offer at the rate of \$9,000 for the whole, he immediately offered \$9,100; and when he learned that McClellan had sold the interests controlled by him at the rate of \$9,200 to Carlisle, he expressed surprise and immediately, on the 22d of June, wrote Carlisle, asking his price for the interest he had purchased. On the 24th day of June, 1881, he received a reply from Carlisle, saying that he did not wish to sell, but desired to purchase the interests of Mrs. Marmion and Miss Walker, and was ready, immediately, "to give *full value* for" them. This was the day before the conveyance of Miss Walker to Marmion. His statement in his testimony of how he and Carlisle entered into competition for this property is as follows:

"I telegraphed Mr. Carlisle to the White Sulphur Springs, calling his attention to the fact that I was the owner of these fractional interests which he wished to have settled, asking him to withdraw the partition suit, and that we could then bid the property off, one against the other, without the expense of the suit. Mr. Carlisle replied that that would be very satisfactory to him, in a very long letter, winding up, though, with the statement that that was satisfactory to him. I submitted a bid to Mr. Carlisle; he submitted it to his wife; she declined the bid and offered a higher price for the whole property. I would decline that and offer a still higher price for the entire property, and so the bidding went on, sometimes by telephone, occasionally, in all probability, by letter, though I do not remember that, and ultimately, when the

price had reached as high a figure as I cared to go, I accepted Mrs. Carlisle's bid through Mr. Carlisle."

On the 6th of September, 1881, these negotiations resulted in a sale by Marmion to Carlisle for \$4,366, or at the rate of \$3,274.50 for Miss Walker's interest, a sum \$974.50 in excess of what he claims to have agreed to give her for it a little more than sixty days previously. The conclusion that at the time he took the conveyance from her he was ready and willing to purchase the residue of the property at a price largely in excess of the rate he claims to have agreed to pay for her interest is inevitable. He sold the interest obtained from her for a price more than forty per centum in advance of that for which he says she sold to him. What he was willing to pay for the other interests, and what Carlisle actually paid for that sold him by Marmion, must be considered the reasonable value for the property in the absence of proof to the contrary.

Nor does it appear that Miss Walker was informed of all the material facts affecting the value of this property at the time or before she conveyed to Marmion. She was not informed that Marmion had offered to purchase the interest that had been conveyed to Mrs. Carlisle, and had inquired the price, and received a reply from Mr. Carlisle declining in emphatic terms to sell, but offering to purchase the other interests at full value, and that Carlisle and Marmion had arranged to carry on a private auction for the property. These facts, considered in connection with the evident desire of each of those gentlemen to acquire the entire property, and their ample means to enable them to do so, were important facts for the information of one about to dispose of an interest in that property. It appears, therefore, that Marmion did not communicate to Miss Walker all the information in his possession necessary to enable her to form a sound judgment of the value of the interest which it is claimed she sold to him, and it also appears that the price which she received did not approximate reasonably near to a fair and

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adequate consideration for her interest, under the facts in this case; and applying the rule stated by Mr. Justice Miller, hereinbefore quoted, Miss Walker, upon discovery of these facts (and it does not appear that she had knowledge of them until after the filing of her bill) had the right to avoid the sale, even if she understood the transaction to be a sale by her to Marmion.

But it appears from the record that Miss Walker did not understand that she sold her interest to Marmion. The allegation of the original bill is that he sold it as her "trusted agent." The deed unexplained would be evidence of a sale, but upon the fact admitted in Marmion's answer that no purchase money was paid by him to her at the time of the conveyance, the law would treat him as holding the legal title as trustee for the grantor. The only evidence in support of Marmion's contention that at the time of the conveyance there was an understanding between them that he should hold the \$2,300 as purchase money in his hands and invest it for her is his own testimony to that effect, which, as hereinbefore shown, is incompetent in this case. So that in any aspect of the case she was entitled to receive the price for which her interest in the property was sold to Mrs. Carlisle.

It is contended, however, by counsel for Marmion, that if it be held that there was the equivalent of an account stated between them so as to debar him from asserting his claims for board and medical attendance, the same rule would preclude her from now asserting this item of \$974.50. But the facts relating to this claim are entirely different from those in relation to Marmion's claims. It is admitted by Marmion that he never accounted to her for this sum, and now denies her right to it, and it does not appear that Miss Walker knew at the times she received the notes and gave the acknowledgment to Marmion that he had received for her interest a sum in excess of \$2,300. She had no knowledge of the item and he did not believe her entitled to it. This

is at least the equivalent of a mutual mistake, upon which ground it is admitted that an account stated may be corrected. It is, therefore, very clear that the court did not err in charging the defendant with this item.

This leaves for consideration the assignment of error made by the counsel for complainant in the original bill, that the court erred in not charging the defendant with interest on the \$974.50 from the date it came to his hands, instead of from the 2d day of April, 1895, when the court by interlocutory decree declared it to be a part of the trust fund.

The specification of error in relation to this item of interest is two-fold. The auditor allowed interest on the \$974.50 from the 7th day of July, 1881, and the counsel for Marmion filed no exception to the auditor's report specially objecting to the allowance of interest, and the claim is that the court erred in considering that question in the absence of such an exception. But defendant's counsel did except to the report of the auditor in charging this sum against Marmion, and this was sufficient to raise all questions in relation thereto, and involved a consideration of the interest as well as the principal.

The other ground of error relied upon is that as the money belonged to Miss Walker, Marmion is liable for interest thereon from the time it came to his hands, and he converted it to his own use. But this money did not come to the defendant's hands in the execution of an express trust, nor is there any contract between the parties, express or implied, to pay interest. If the complainant is entitled to interest upon the sum in question it is by way of damages for delaying payment after the sum became due and payable. In the case of *Redfield v. Ystalyfera Iron Co.*, 110 U. S. 176, speaking about the recovery of interest, the Supreme Court said: "Interest is given on money demands as damages for delay in payment, being in just compensation to the plaintiff for a default on the part of his debtor. Where it is reserved expressly in the contract, or is implied

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by the nature of the promise, it becomes a part of the debt, and is recoverable as of right; but when it is given as damages, it is often matter of discretion." Marmion claimed this money as his own, and there is nothing to show that he did not in good faith believe that he might properly purchase from Miss Walker, as he might from any other person. The law, therefore, does not raise an implied promise on his part to pay either principal or interest. Had Marmion understood that in law this was her money, there is every reason to believe that he would have invested it, as he did her other funds, and in the same kind of securities. It appears in the evidence that he paid the interest on the whole \$6,700 for some time after the principal had been much reduced by partial payments to her, and under the circumstances it is equitable to charge interest on the \$974.50 only from the time that Marmion was called upon by the decree of the court to account for and pay over the money, as was done by the decree under consideration.

This disposes of all the errors assigned, and there being none found in the record, the decree must be *affirmed, each party to pay his own costs on appeal.*

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## BRADSHAW v. EARNSHAW.

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### PLEADING AND PRACTICE; CERTIORARI; JUSTICE OF THE PEACE; NONSUIT.

1. In order to review or quash the proceedings of an inferior tribunal on *certiorari*, the inferior tribunal must have proceeded in the cause without jurisdiction, or its procedure must have been clearly illegal, or unknown to the law, or so essentially irregular as to be contrary to right and justice; and the writ of *certiorari* can not be made to serve the purposes of a writ of error, or an appeal with bill of exception.
2. A writ of *certiorari* to a justice of the peace is properly quashed where the alleged irregularity consists of the fact that a jury

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was empanelled on demand of the defendant before a formal joinder of issue by the plaintiff upon the pleas of the defendant, and the justice proceeded to hear the evidence of the defendant and render judgment in his favor, the plaintiff declining to join issue or participate in the trial.

3. A plaintiff may elect to take a *nonsuit* or *non pros* of his case at any stage of it before verdict rendered, subject to payment of the defendant's costs.

No. 724. Submitted October 6, 1897. Decided December 7, 1897.

HEARING on an appeal from an order quashing a writ of *certiorari*. *Affirmed*.

The facts are sufficiently stated in the opinion.

*Mr. Chapman W. Maupin* for the appellants.

*Mr. Frank T. Browning* and *Mr. C. A. Keigwin* for the appellee.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

This appeal is taken from an order of the court below, quashing a writ of *certiorari* issued to a justice of the peace, requiring him to certify and return to the court certain proceedings that had taken place before him in a civil cause, instituted to recover a debt alleged to be due from the defendant, Basil B. Earnshaw, to the plaintiffs in those proceedings, Bradshaw & Wait. The justice made return to the writ of *certiorari*, and with it the proceedings that had taken place, but they do not show any such proceedings as furnish the ground for the issue of a *certiorari*.

It appears that an action had been brought by the plaintiffs against the defendant on matter of account, and that subsequently there was a transfer of the cause from the justice issuing the original process to another justice, and that it is of the proceedings had before the latter justice that complaint is made. In the petition for the writ of *certiorari*, the plaintiffs state their grievance to be, that after the defendant had filed his pleas and affidavit of defence, a jury was prematurely demanded by the defendant, and that

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such jury was empanelled and sworn to try the cause without a formal *joining of issue as required by the statute*; and that a verdict was rendered in favor of the defendant, on matter of set-off pleaded to the claim of the plaintiffs.

In the petition for the writ it is stated, that the defendant filed pleas and an affidavit of defence; that the plaintiffs, under a rule prescribed by the Supreme Court of this District, to regulate proceedings before justices of the peace, moved for judgment against the defendant, for want of sufficient affidavit of defence, but that such motion was overruled by the justice; that the justice also refused to discharge the jury that had been summoned; and immediately upon the overruling of said motion, *the plaintiffs refused to join issue upon the pleas filed by the defendant*; but the justice, notwithstanding the absence of a formal issue joined, and against the protest of the plaintiffs, proceeded to empanel a jury and to receive evidence offered by the defendant, and to receive a verdict and enter judgment thereon against the plaintiffs, on a set-off claimed by the defendant of unliquidated damages arising out of a contract separate and distinct from that sued on by the plaintiffs—*the plaintiffs taking no part in said so-called trial*. That the defendant and the justice, by their premature action in summoning and empanelling a jury before the pleadings had been settled and *issue joined* in the cause, deprived the plaintiffs of their right to have the cause continued, in order to enable them to take testimony of witnesses in Chicago, without which testimony they could not safely have gone to trial. In consideration of the premises, and especially because they are without remedy by way of appeal or writ of error, the petitioners prayed that the writ of *certiorari* should issue to the justice to certify his proceedings, etc.

There is no question of the existence of jurisdiction of the justice of the peace in this case, of both parties and of the subject-matter of litigation. The whole trouble or supposed grievance appears to be in regard to mere matter of regu-

larity of procedure; and that trouble appears to have been brought on by the act of the plaintiffs themselves in refusing to join issue on the defendant's pleas, and to participate in the trial. It was the duty of the plaintiffs either to join issue on the pleas, or to suffer a *non-suit* of their action, for failure further to proceed. It was the right of the defendant, under the statute, to demand trial by jury; and if the plaintiffs did not then and there desire to proceed to trial in the manner that the defendant had elected, under the statute, they could have suffered a *non-suit* or *non-pros.* of their cause. That was their right. A plaintiff may elect to take a *non-suit* or *non-pros.* of his case at any stage of it before verdict rendered, subject, however, to payment of defendant's costs. 3 Black. Com. 295, 296; 2 Tidd's Prac. 727, 728; *Borden Mining Co. v. Barey*, 17 Md. 429; *Hall & Loney v. Schuchardt*, 34 Md. 15, 19, 20; *Ferrall v. Farmen*, 67 Md. 83; *Evans' Md. Prac.* 402. But, in the proceedings before a justice of the peace, in the civil cases authorized to be tried by them, there is no special pleading, such as is known and practiced in the higher courts of common law jurisdiction. This we have recently held in the case of *Carver v. O'Neal*, decided at the present term, *ante*, p. 353. The great object and policy of the law, in conferring jurisdiction upon justices of the peace in civil cases, is simplification, and the avoidance of the technical rules and delay that attend the prosecution of suits in the higher courts. And when the statute of 1823 declares that it shall be lawful for either of the parties to the suit, "*after issue joined*, and before the justice shall proceed to inquire into the merits of the cause," to demand a jury, it must be construed to mean, and to refer to, such issue as had been and was understood to obtain in practice in civil proceedings before justices of the peace. It was certainly not intended by that statute to introduce into the practice of justices of the peace of this District the technical forms and rules of pleading known only to the practice of the higher courts of common law jurisdiction. When

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the plaintiff and defendant had made known to the justice their respective contentions in regard to the matters in litigation, and exhibited their respective claims, the issue was regarded as formed or joined, and no greater formality was or is required than the signification by the respective parties of his or their readiness for trial, neither party being excused if in default. In this case, after the claims of both parties had been exhibited to the justice, and the cause had been continued or postponed to a certain day for trial, when the time arrived for trial, the plaintiffs refused to consent to proceed to trial, but withdrew from the case. They were, therefore, in default, and, consequently, not in a position to insist that the proceeding by the justice was unwarranted as for want of jurisdiction to proceed to trial.

There may have been errors and irregularities in the proceedings by the justice, but they formed no ground for the issue of the writ of *certiorari*, if the justice had jurisdiction of the parties and of the subject matter of litigation, and possessed the power to decide the matter in dispute. It is only where it is plainly shown that the proceedings are infected with some fatal irregularity rendering them absolutely void, such as the want of notice, or the refusal of a hearing to a party entitled to it, and the like; or that the jurisdiction of the cause did not belong to the court or justice assuming to exercise it, but to a different court; or that the cause involved is of a nature the jurisdiction of which is denied to any court, because not within the limits of judicial power, that a *certiorari* will issue to bring up proceedings for review. . *Patton v. Houston*, 40 La. Ann. 395. Or, as the principle is stated in other cases, in order to review and quash the proceedings of an inferior tribunal upon the common law writ of *certiorari*, the inferior tribunal must have proceeded in the cause without jurisdiction, or its procedure must have been clearly illegal, or unknown to the law, or so essentially irregular as to be contrary to right and justice; and that the writ of *certiorari* is not permitted

to serve the purposes of a writ of error, or an appeal with bill of exception. *Jacksonville, etc., R. Co. v. Boy*, 34 Fla. 389; *Hunt v. Jacksonville*, 34 Fla. 504; *Harris v. Barber*, 129 U. S. 366; *In re Schneider*, 148 U. S. 162.

In this case, the justice had full jurisdiction, and the worst that can be said of his proceedings is, that there may be errors and irregularities, but not such as to infect them with invalidity, such as to justify a review upon *certiorari*.  
*Order affirmed.*

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## THE UNITED STATES OF AMERICA

v.

## MILLS.

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CERTIORARI; CRIMINAL LAW; UNITED STATES COMMISSIONERS;  
POOR CONVICTS; POLICE COURT; APPELLATE PRACTICE.

1. The writ of *certiorari* can not be used to test the right of a party to hold the office of United States Commissioner, or the authority of the Supreme Court of the District to appoint such an officer.
2. Whether the Supreme Court of this District has the authority to appoint a United States Commissioner, *quære*.
3. Sections 1042 and 5296, R. S. U. S., relating to the discharge of poor convicts who are unable to pay fines imposed upon them after 30 days imprisonment for the nonpayment of such fines, are locally applicable to this District and are in force here.
4. The Police Court of this District, although a court of the United States in one sense, is not a court of the United States within the meaning of the Federal Constitution.
5. The powers vested by Sec. 1042, R. S. U. S., relating to the discharge of poor convicts, in United States Commissioners can be exercised in this District only with reference to those cases in which persons are imprisoned for nonpayment of a fine under sentence of the Supreme Court of this District, sitting as a circuit or district court of the United States, and administering the general penal code of the United States; and there

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## Statement of the Case.

is no warrant of law for the exercise of such powers with reference to the local penal law of the District of Columbia and the sentences of the Police Court.

6. The writ of *certiorari* is the proper means of preventing the exercise by a United States Commissioner of such powers with reference to a person imprisoned under a sentence of the Police Court of this District; but where during the pendency of an appeal by the United States from an order quashing a writ of *certiorari*, the sentence of the prisoner expired, this court *dismissed* the appeal.

No. 745. Submitted November 16, 1897. Decided December 7, 1897.

HEARING on an appeal by the United States from an order quashing a writ of *certiorari*. *Appeal dismissed.*

The COURT in its opinion stated the case as follows :

This is an appeal by the United States from an order of the Supreme Court of the District of Columbia quashing a writ of *certiorari*.

The petition for the writ, which was filed on October 5, 1897, recites that one Beckett, on September 3, 1897, in the Police Court of the District of Columbia, was convicted of the crime of larceny, and was sentenced by that court to pay a fine of \$15 and in default of the payment of such fine to be imprisoned in jail for sixty days; that Beckett did not pay the fine and was committed to jail, and has not been in jail for sixty days; that the defendant, Samuel C. Mills, attempts to exercise the office of a United States Commissioner under supposed authority of an appointment by the Supreme Court of the District of Columbia; that among other duties which he attempts to perform is the discharge of poor convicts under Sections 1042 and 5296 of the Revised Statutes of the United States; that, on October 4, 1897, Beckett made application to the respondent in conformity with said sections of the Revised Statutes, and the respondent was about to hear the said application and to act thereon as though he (Mills) was a United States Commissioner duly authorized, and as though Beckett came within the said sections of the Revised Statutes; and the petition thereupon avers that the

respondent has no lawful authority to act as such commissioner, he not having been appointed such by lawful authority; that he had no jurisdiction in the premises, as Beckett had been imprisoned by lawful authority for a specified time, and is not detained merely for the nonpayment of a fine; that the sentence of Beckett was imposed by a court, whose fines, imprisonments and sentences do not come within the sections of the Revised Statutes aforesaid; and that the acts and the attempted acts of the respondent are null and void, and that he had no authority to order Beckett's production before him, or to permit him to file his application, or to proceed to a hearing upon the same.

The respondent Mills made return to the writ; and the return shows the facts stated in the petition to be true, leaving the questions of law raised by it to be determined by the court.

Upon the return, motion was made to quash the writ, and the motion prevailed. The court made an order to quash the writ, and to remand the papers to the commissioner (the respondent), who was directed to proceed in the matter according to law.

From this order the United States have appealed to this court.

*Mr. Henry E. Davis*, United States Attorney for the District of Columbia, and *Mr. D. W. Baker*, Assistant Attorney, for the United States.

*Mr. Arthur A. Birney* and *Mr. H. F. Woodard* for the appellee.

Mr. Justice MORRIS delivered the opinion of the Court:

There are five assignments of error made by the appellants; but the questions sought to be raised may be reduced to two: 1st. Whether the respondent Mills is entitled by virtue of his appointment by the Supreme Court of the District of Columbia to perform the duties of United States

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## Opinion of the Court.

Commissioner and to exercise the authority vested by the several statutes of the United States in such commissioners; and, 2d. Whether the Police Court of the District of Columbia is one of the courts of the United States whose sentences are intended to be included within the provisions of Sections 1042 and 5296 of the Revised Statutes of the United States relative to the discharge of poor convicts unable to pay the fines imposed upon them, after they have been in prison for thirty days for the nonpayment of such fines.

1. With reference to the first of these questions, we are compelled in the present case to leave it undetermined. The writ of *certiorari* can not be used to test the right of the respondent to hold the office of United States Commissioner, or the authority of the Supreme Court of the District of Columbia to make the appointment. The function of the writ in this District is to determine whether an inferior court or an officer exercising judicial or quasi-judicial functions, seeking to proceed with a cause, has jurisdiction so to do. *Hendley v. Clark*, 8 App. D. C. 165, 183, and cases there cited; also *Bradshaw v. Earnshaw*, just decided, *ante*, p. 495. Or, in other words, it is intended to check excess of jurisdiction. We do not desire to be understood as deciding that this is its only function. But certainly among its purposes is not to be included the inquiry whether the inferior court or officer, to whom the writ is addressed, has any legal existence as such court or officer. That legal existence seems necessarily to be implied by the requirement of the writ that the record and proceedings be transmitted to the superior court for examination as to their legality; for there could be no record and no formal legal proceedings unless there was a court or *de facto* officer in existence. While no sufficient reason has been adduced to us for questioning the power and authority of the Supreme Court of the District of Columbia, acting as a district court of the United States for this District, to appoint United

States Commissioners for all the purposes for which such commissioners are authorized by the laws of the United States, we deem it unnecessary definitely to determine that question, since determination of it would seem to be precluded by the form in which the proceedings have been instituted.

2. The most important question in the case, and that which is directly and explicitly presented for our consideration, is whether United States Commissioners in the District of Columbia are authorized and empowered by Sections 1042 and 5296 of the Revised Statutes of the United States to discharge convicts held under sentences of the Police Court of the District, after the expiration of thirty days of such sentences, if the convicts swear that they are poor and unable to pay the fine imposed upon them.

Sections 1042 and 5296 of the Revised Statutes of the United States are mere repetitions of each other with slight change of phraseology, the repetition no doubt being due to inadvertence on the part of the revisers. Both sections are taken from Section 14 of the Act of Congress of June 1, 1872 (17 Stat. 196), which act purports to be one "to further the administration of justice," and of which most of the sections have specific reference to the circuit and district courts of the United States. Section 1042 is in the following terms:

"When a poor convict, sentenced by any court of the United States to pay a fine, or fine and cost, whether with or without imprisonment, has been confined in prison thirty days, solely for the nonpayment of such fine, or fine and cost, he may make application in writing to any commissioner of the United States Court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and cost, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter; and if on examination it shall appear to him that

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such convict is unable to pay such fine, or fine and cost, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: 'I do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars, except such as is exempt by law from being taken on civil precept for debt by the laws of the (State where the oath is administered); and that I have no property in any way conveyed or concealed, or in any way disposed of for my future use or benefit.' And thereupon such convict shall be discharged, the commissioner giving to the jailer or keeper of the jail a certificate setting forth the facts."

That there is no good reason to confine the application of this enactment to the courts of the United States in the several States, exclusive of those of the District of Columbia, seems very clear to us. Its provisions are not locally inapplicable to the District of Columbia, and so far as those provisions are the expression of a general policy, that policy undoubtedly is as applicable to the District of Columbia as anywhere else in the United States. Moreover, the very change of expression here is significant of the legislative purpose. In the previous sections of the act of June 1, 1872, from which the enactment in question, as we have stated, was taken, the special mention is of the "circuit and district courts of the United States;" while in the fourteenth section, that now under consideration, the express language used is "any court of the United States." Nor is there any good reason for the restriction of this expression to the so-called general system of the courts of the United States, assumed to be confined to the Federal courts in the several States of the Union. We must regard the Federal courts in the District of Columbia as being as much an integral part of the Federal judicial system as are the Federal courts in the States; for the jurisdiction of the Federal Government over the District of Columbia is as explicitly ordained by the

Constitution as is any other grant of power to the Federal Union; and is inalienable. The case of *McAllister v. United States*, 141 U. S. 174, which is cited to us in this connection, has reference merely to existing conditions in the Territories of the United States, which, from their peculiarly temporary and transitional character, antagonistic to all theory of permanency, must necessarily be dissevered from the permanent judicial organization for the States and the District of Columbia, and may well be assumed not to have been within the meaning or purpose of the framers of the Constitution, when they provided for the organization of our permanent judicial system.

But it does not necessarily follow from this that the expression—"any court of the United States"—used by Congress in Section 1042 of the Revised Statutes, was intended, or should be construed, to include such a tribunal as the Police Court of the District of Columbia. That court is undoubtedly in one sense a court of the United States, as is even the court of a justice of the peace in this District, or a court martial, or any other tribunal established by Congress for temporary or special circumstances; and it does not make the Police Court any less a court of the United States to call it a legislative court; for the legislative power can establish no court, either here or elsewhere, which is not authorized by the Constitution. But the fact that the Police Court is a court of the United States, created by the Congress of the United States under the authority of the Constitution of the United States, does not necessarily make applicable to it all laws enacted for the courts of the United States.

It is one of the settled rules for the construction of statutes, that general words in a statute may be restricted in order to give effect to the legislative purpose. See Potter's *Dwarris on Statutes*, p. 164; *Sedgwick on Statutory and Constitutional Law*, Ch. 6; *Reiche v. Smythe*, 13 Wall. 162, Now, it requires no elaboration of argument or citation of

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authorities to show that when there is mention, either in the Constitution or in the statute law, of the courts of the United States, the courts thereby meant are those of general jurisdiction—not temporary, transitional, or sporadic courts; or courts of inferior and limited jurisdiction, specially organized to deal in a summary way with petty matters, either civil or criminal, outside of the usual course and scope of the common law. Of the latter character, undoubtedly, is the Police Court of the District of Columbia, although some common law jurisdiction has now been conferred upon it, and it has been authorized to proceed in divers cases in accordance with common law methods. Like the courts of the justices of the peace, which it was intended in criminal matters to supersede, its purpose was to take the place of the county courts or other courts of minor jurisdiction in England, which were never regarded as being within the general judicial system of that country, and the successors of which for the District of Columbia were certainly never contemplated by the framers of the Federal Constitution as coming within the scope of the provisions which they established for a Federal judicial system. The Police Court of the District of Columbia, therefore, although a court of the United States, is not a court of the United States in the sense of the Federal Constitution, and there is no reason for giving to the same expression in a statute a broader meaning than is given to it in the Constitution. In fact, when there is mention of the courts of the United States in any statute, we may conclusively assume that only the courts of general jurisdiction intended by the Constitution are meant, unless there is special reason to be deduced from the context of the statute for giving to the expression a different meaning.

Nor does it necessarily follow from this construction of the law that the anomaly will ensue which is suggested by counsel for the appellee, to the effect that there would be one rule applicable to poor convicts imprisoned under sentences of the Supreme Court of the District of Columbia, and another and

more severe rule to such convicts held for precisely similar offences under sentences of the Police Court of the District. Here another consideration intervenes.

Under what we may designate as the general criminal code of the United States, enacted for the Federal Union at large, it will be noticed that there is no statutory provision made for the enforcement of a fine, when that is the penalty imposed, or the only part of the penalty that remains to be performed; and the enforcement can only be by imprisonment of the convict until the fine is paid. This necessarily leaves the duration of the time of detention for this purpose indefinite; and no harm is done by such indefiniteness in the case of those who are able, but unwilling, to pay. In the case, however, of those who are unable to pay, the imprisonment would practically be perpetual, that is, for life, were it not for the provisions of Section 1042 of the Revised Statutes, which make it possible for poor convicts to relieve themselves from such imprisonment after the lapse of thirty days. See *In re Ruhl*, 5 Sawy. 186; *Kie v. United States*, 27 Fed. Rep. 356.

But under the special legislation of Congress for the District of Columbia, a different condition obtains. Here we have a special penal code, partly statutory and partly of common law origin, but applicable exclusively to the District of Columbia. Here the law is not silent as to the method of the enforcement of fines, when fines are imposed as penalties for criminal offences. On the contrary, there is a well defined system of commutation of fines, and specific provisions are found for the guidance of the courts in the event of default in the payment of fines. We need go no further back than the last act of Congress upon this subject, the act of July 23, 1892 (27 Stat. 262), wherein it was expressly provided that "in all cases where the said (police) court shall impose a fine, it may, in default of the payment of the fine imposed, commit the defendant for such time as the court thinks right and proper, not to exceed one year." Even if this be not inconsistent with the general code for

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the Union, it is well settled law that, where there is a special or particular statute, and also a general statute, both applicable to the same subject-matter, the special or particular statute must prevail. *Ex parte Crow Dog*, 109 U. S. 556; *State v. Stoll*, 17 Wall. 425; *Cass Co. v. Gillett*, 100 U. S. 585. And in no case can this rule be more appropriately applied than to the legislation of Congress for the District of Columbia as distinguished from its legislation for the Federal Union.

It is quite clear to us that the power vested in United States Commissioners by Section 1042 of the Revised Statutes, if attempted to be exercised in the District of Columbia, to release poor convicts at the expiration of thirty days imprisonment imposed in default of the payment of a fine, is entirely inconsistent with the power vested in the Police Court of the District to fix a term of imprisonment not to exceed one year, in such a contingency. And when we consider the impropriety of the interference of such an officer as a United States Commissioner with the well-defined and specific sentence of a judicial tribunal, and the class of offenders and offences cognizable in the Police Court, we can not think that it was at all the intention of Congress in any manner to authorize such interference with the sentences of the Police Court of the District of Columbia. No construction of Section 1042 of the Revised Statutes under any recognized canon of interpretation, will justify the application of that section to the Police Court; and no sufficient reason can be found, either in public policy or otherwise, that would authorize a construction of the statute such as would bring the Police Court within its purview.

We conclude, therefore, that the powers vested by Section 1042 of the Revised Statutes in United States Commissioners are to be exercised in the District of Columbia only with reference to those cases in which persons are held in prison for the nonpayment of a fine under sentences of the Supreme Court of the District of Columbia sitting as a circuit

or district court of the United States for this District and administering the general penal code of the United States; and that there is no warrant of law for the exercise of such powers with reference to the local penal law of the District of Columbia and the sentences of the Police Court.

It was proper in the present case by the writ of *certiorari* to prevent the exercise by the respondent of the powers which he attempted to exercise in the case before him; and the Supreme Court of the District of Columbia should have restrained him from proceeding in the case, and should not have quashed the writ. Our proper course, therefore, would be to reverse the order appealed from, and to remand the cause to the Supreme Court of the District of Columbia, with direction to proceed therein in accordance with law and in a manner not inconsistent with this opinion. But we can not ignore the fact apparent on the record of the case before us that the subject of the suit has failed since the taking of the appeal. The sentence of Beckett was for sixty days. That term expired on November 3, 1897. The action of the commissioner having been arrested by the service upon him of the writ of *certiorari* and subsequently by the appeal taken from the order of the court below quashing the writ, that action was ineffectual to interfere with Beckett's sentence; and we must presume that he has performed that sentence in full; and that it has now expired by its own limitation. There is nothing now for the respondent or appellee as commissioner to do or undo, and nothing upon which he can act. Nor can the writ of *certiorari* be made any longer to serve any good purpose, or any purpose whatever in this case, even if, in accordance with the opinion here expressed, we were to direct a reversal of the order therein made by the court below. But while, under the special circumstances of this case, the only formal order that we can now enter is one dismissing the appeal, in view of the fact that the subject-matter of the proceedings has passed out of existence, we are warranted by the fact, that

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the questions here involved are of great public importance in the administration of justice in this District and would undoubtedly be of speedy and frequent recurrence, to determine those questions so far as we may in the present suit. For this course we have the authority of the Court of Appeals of the State of New York, when confronted by a somewhat similar situation. *People v. Martin*, 142 U. S. 228, 235. And the case of *Marbury v. Madison*, 1 Cranch, 137, is an authority substantially to the same effect. The questions involved were properly raised and could properly be determined during the pendency of the proceedings in the court below; and in a case of this kind it would seem to be unnecessary to postpone their determination until a case is reached in which a longer sentence would give more opportunity for a leisurely decision.

Our conclusion, therefore, is that while we regard the commissioner's action as unwarranted by the present condition of our law and that the order of the court below should have been a prohibition to him to proceed in the case, yet, in view of the expiration of Beckett's sentence pending the appeal of this court, we must now *dismiss the appeal*. *This will accordingly be done. And it is so ordered.*

LANSBURGH v. THE DISTRICT OF COLUMBIA.

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## CONSTITUTIONAL LAW ; POLICE POWERS ; GIFT ENTERPRISES.

1. Congress has the same police powers in the District of Columbia as the State legislatures have within their several jurisdictions.
2. It is only where a statute purporting to exercise police powers has no real or substantial relation to the protection of the public health, safety, peace and morals, or is a palpable invasion of the rights secured by the fundamental law, that the courts will declare it void.
3. An enterprise by which a trading stamp company distributes among merchant subscribers so-called trading stamps for distribution to customers according to the amounts of their purchases, which stamps when collected in sufficient numbers entitle the holders to premiums supplied by the company, is within the meaning of the act of Congress of February 17, 1873 (R. S. D. C., Secs. 1176 and 1177), prohibiting gift enterprises in the District of Columbia.

No. 749. Submitted November 16, 1897. Decided December 7, 1897.

IN ERROR to the Police Court of the District of Columbia. *Affirmed.*

The COURT in its opinion stated the case as follows:

The plaintiffs in error were convicted in the Police Court of the District of Columbia and sentenced to pay fines of \$100 each, under an information charging them with having "engaged in the business of a gift enterprise." The trial was by the court, a jury having been waived, and the judgment of conviction was rendered upon evidence disclosing the following facts:

The defendant, Gustave Lansburgh, is a member of a partnership styled Lansburgh & Bro., engaged in business in the city of Washington, as retail merchants. Defendant, Joseph A. Sperry, is the managing officer of a private corporation, called Washington Trading Stamp Company, the principal office of which is in the city of New York.

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## Statement of the Case.

On October 5, 1897, Lansburgh & Bro. entered into a written contract with the Washington Trading Stamp Company, in substance as follows:

"WASHINGTON, D. C., Oct. 5, 1897.

"This agreement, by and between the Washington Trading Stamp Co., of Washington, D. C., parties of the first part, and Lansburgh & Bro., of Washington, D. C., party of the second part.

"*Witnesseth*, that the said party of the first part, for the consideration hereinafter mentioned, agrees with the party of the second part to perform in a faithful manner the following: To print in the directory of their subscriber's book, the name, business and address of the party of the second part. To deliver at the homes of the people of Washington, 100,000 copies of said books, soliciting their trade, and to instruct and to explain them how they are to use the same, and keep a correct list of the names and addresses of all persons to whom same are delivered; and in every way to use their best endeavor to promote the business interest and trade of the party of the second part. And the party of the second part agrees with the party of the first part, in consideration of the faithful performance of the foregoing, to receive from the party of the first part a sufficient amount of trading stamps to supply all persons who may call for them. The stamps to be given out as follows: one stamp to be given for each and every ten cents represented in a purchase; ten stamps for one dollar, etc., the stamps to be given when the purchases are paid for. To pay party of the first part fifty cents per hundred for all stamps thus used. To make weekly settlements for each page used or given out. And party of the second part further agrees, not to sell any stamps, and to give them only to parties purchasing goods from their store. To co-operate in every way possible with party of the first part to promote the best interest of all the merchants named in the book. To

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display 'We give trading stamps,' in a conspicuous place in their store.

"The parties of the first and second part mutually agree that this agreement shall remain in force for one year from above date."

On the back of said contract is the following indorsement: "Excludes all other dry goods and department stores in Washington, D. C., except those now engaged in our plan."

The book referred to in the contract, 100,000 copies of which were to be distributed among the residents of Washington, is a small pamphlet of some forty pages, in a green paper cover bearing the imprint of copyright secured. It bears the title, "Trading Stamp Book," in large letters on the first page of the cover, over a *fac simile* of the green stamp proposed to be used.

The first three pages contain the following printed words under the titles of "Explanation" and "Notice to Stamp Collectors":

## EXPLANATION.

The Trading Stamp Company has established a permanent business in your city.

The object of this syndicate of merchants is to mutually benefit the buyer and the seller.

To this end, we have contracted with the leading merchants of your city, so, if you trade with these merchants and collect stamps, you will be able to obtain beautiful and useful premiums, absolutely free of any expense to yourself.

You will find, commencing on page 3 of this book, a directory of the merchants who give trading stamps.

These merchants give you a trading stamp for each and every ten cents' worth of cash goods you buy. For example, if you buy ten cents' worth of groceries, you will receive one trading stamp; if your bill amounts to \$1.00, you will receive ten trading stamps, etc.

You will only receive stamps for the multiple of ten that

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is in your purchase. For instance, if your bill is twenty-five cents, you will only receive two stamps, etc.

Stick the stamps on the figures on the pages in this book. When you have filled the book, you are entitled to your choice of over one thousand premiums, constantly kept in stock at our store, No. 423 Seventh Street N. W., a few of which are mentioned in the back of the book. Call at our store and see complete stock.

Ask for trading stamps. As a rule, merchants do not give them unless called for.

The syndicate of merchants whose names appear in the accompanying lists, and who represent the leading and enterprising business men of their lines in the city, are anxious to secure new cash customers, and thus increase their trade, by giving trading stamps. And when received by the customer from the several merchants with whom he trades, to the amount of \$99.00 or more, from any or all the stores combined, will be exchanged for the customer's choice of a large variety of magnificent premiums carried in stock by The Trading Stamp Company, consisting of richest designs in quadruple-plated silverware, books, pictures, clocks, lamps, furniture, bicycles, opera glasses, cameras, musical instruments, gold rings, etc.

It is a strictly "up-to-date" idea, being operated by a syndicate of "up-to-date" merchants, who through it are making a notable effort to secure the trade of an "up-to-date" people.

*Bear in mind*, the merchants will make no advance in the prices of their goods, but, on the contrary, the increase of trade by this new plan will enable them to sell closer than ever before.

If you do not care to take advantage of these privileges yourself, give some deserving person the benefit, or turn the stamps over to your children or servants.

*Be sure to ask for trading stamps.* As this plan is new to the merchants, they may unintentionally neglect to give

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you stamps. The remedy lies with the customer. You should not hesitate to ask for trading stamps from any merchant in the directory.

## NOTICE TO STAMP COLLECTORS.

Trading stamps make business hum, increase merchants' trade, and bring in the cash. For this reason you need not hesitate to ask for stamps. Merchants will not force stamps upon you. Ask for them.

If you trade only with merchants who can supply you with stamps your book will soon be full. Remember, you can obtain stamps for any article you may wish to buy.

When merchants give you the stamps willingly, you will know they are anxious to please you and secure your patronage. Tell your merchant you are trading with him because he gives stamps.

The great advantage of *this* system is that you do not have to carry your book with you when shopping; simply ask for stamps. Do not lose them, but take them home and paste them in your book.

Should any merchant whose name is in our directory not treat you courteously or refuse to give you trading stamps, he is unworthy your patronage, having broken his contract with us, and you will do us a great favor by reporting the matter to us.

The foregoing are followed by a list containing several hundred names of merchants, with the nature of their business, alphabetically arranged, and their respective locations by street and number under the following title: "Directory of leading enterprising merchants who give trading stamps." Thirty-three pages follow, each ruled so as to show thirty squares within which the stamps are to be pasted according to minute directions given.

The last two pages of the cover contain a list of part of the "over a thousand very attractive, valuable and useful premiums to select from," with the information that "these

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can be secured free," and further that "we are constantly adding new premiums to our stock."

The gifts or premiums are kept for exhibition and delivery at the store or wareroom of the Stamp Company. No gift or present is made except upon the presentation of one of the books aforesaid filled with stamps to the number of 990. Only one of the exhibited articles (to be selected by the holder of the book) will be delivered upon the surrender of each book; but special notice is given that a \$100 bicycle will be exchanged for seven books, and a sewing machine for five.

It is indicated by the endorsement on the contract and admitted on the argument, that the Trading Stamp Company limits its benefits to a particular number of dealers in each line of business carried on in Washington, whose names appear in the directory aforesaid.

*Mr. A. S. Worthington* for the plaintiff in error :

1. Reasonably construed, section 1177 applies only to gift enterprises in which the distribution of gifts or prizes is in some way regulated by lot or chance. The trading-stamp business as carried on by the defendants contains no element of chance. Every customer of the stores engaged in the business who pays cash for what he purchases is entitled to demand and receive stamps to the extent of one stamp for every ten cents' worth purchased, and every such customer when he has accumulated nine hundred and ninety of the stamps is entitled to demand of the Trading Company at its stores that they be exchanged for such articles as he may select. Every customer whose purchases amount to ten cents or more is entitled to the benefit of the discount, and the discount is the same to everybody. This prosecution therefore can not be sustained, unless it be determined that Congress has undertaken to prohibit every person who has anything to sell from offering a gift or discount to anybody who will buy that thing.

So far as we have been able to find, every case sustaining a prosecution under anti-lottery or anti-gift enterprise statutes has been a case in which the defendant had either distributed prizes among persons chosen by lot or chance or had distributed to all his customers prizes of unequal value, the person who was to receive each prize being determined by lot or chance. Rarely, indeed, has any prosecution been ever attempted where, as in this case, the element of chance is entirely eliminated, and in every such instance the courts have acquitted the defendants, either because the law was void or because, properly construed, the defendant had not violated it. *People v. Gillson*, 109 N. Y. 395, 399; *Long v. State*, 73 Md. 527; S. C., 74 Md. 565; *Yellow Stone Kit v. State*, 88 Ala. 196; *State v. Randle*, 41 Tex. 292; S. C., 42 Tex. 580.

It may be contended that the language of section 1177 is so broad that it can not reasonably be restricted in its application to immoral gift enterprises. The language used is, indeed, exceedingly general. The definition of "gift enterprise," as contained in the act of the Legislative Assembly, was very comprehensive, and the act of 1873, as carried into sections 1176 and 1177, makes it unlawful to engage in a gift-enterprise business in the manner defined by the Legislative Assembly "or otherwise." The Legislative Assembly was providing for the licensing of gift enterprises. Its object was to include everything that might possibly go by that name so as to enhance the revenues of the District. A liberal construction would be applied in such a case. The purpose of Congress, on the contrary, it must be supposed, was to protect the morals of the community—to prevent a species of gambling. Hence a different rule must be applied in construing the act of Congress. Many cases might be referred to in which language as broad as this has been narrowed by construction so as to apply only to what was obviously within the intent of the law-making power. *In re Chapman*, 166 U. S. 661, 667, *United States v. Kirby*, 7 Wall. 482.

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In this and other like cases in the State courts the decisions rest either upon section 1 of the fourteenth amendment to the Constitution of the United States, which provides that no State shall "deprive any person of life, liberty, or property without due process of law," or upon provisions of the State constitutions which contain similar language. The fifth amendment to the Constitution of the United States contains such a prohibition, which is binding upon the United States. The provision of the fourteenth amendment above referred to was required simply because it had been held that the fifth amendment (and all the other amendments from the first to the tenth, inclusive) bound the general government and not the individual States. *Barron v. Mayor*, 7 Pet. 243, 247; *Thorington v. Montgomery*, 147 U. S. 492.

The opinion in *Allgeyer v. Louisiana*, 165 U. S. 578, 589, shows that the Supreme Court has always held that such an interference with the use of property as section 1177 contemplates, if it is to be construed as applying to gift enterprises involving no immoral feature, deprives the citizen of his "liberty" as that word is used in the fifth and fourteenth amendments to the Constitution. See also *Rwy. Co. v. Minnesota*, 134 U. S. 418; *Boyd v. United States*, 116 U. S. 616; *Counselman v. Hitchcock*, 142 U. S. 547.

Section 1177, if construed as insisted upon by the counsel for the District of Columbia, must be held void in so far as it applies to such enterprises as that in which these defendants are shown to have engaged. It was held by this court in *Chapman v. United States*, 5 App. D. C. 131, that where an act of Congress is so broad as to cover both constitutional and unconstitutional provisions it may be held void when it is undertaken to apply it to those cases which are beyond the power of Congress and valid as to those transactions with which Congress had the right to interfere.

*Mr. S. T. Thomas*, Attorney for the District of Columbia,

and Mr. A. B. Duvall, Assistant Attorney, for the defendant in error:

1. The trading stamp scheme is not only a gift enterprise but it is a species of lottery. "A gift enterprise, in common parlance a scheme for the division or distribution of certain articles of property, to be determined by chance, among those who have taken shares in the scheme." Anderson's Dictionary of Law, 488. "A scheme for the division or distribution of certain articles of property, to be determined by chance, among those who have taken shares in the scheme. The phrase has attained such a notoriety as to justify a court in taking judicial notice of what is meant and understood by it." Black's Law Dictionary, 539. A lottery has been adjudged to be a scheme "for the distribution of prizes by chance." This definition is adopted by the Supreme Court of the United States, in *Horner v. United States*, 147 U. S. 449. The attention of the court is called to this case where the court reviews a number of cases in which schemes similar to that developed by the case at bar are held to be lottery schemes. *Dunn v. People*, 40 Ill. 465; *Davenport v. Ottawa*, 54 Kans. 711; *Bell v. State*, 5 Sneed, 507; *United States v. Wallis*, 58 Fed Rep. 942; *Hudelstone v. State*, 91 Ind. 426; *Taylor v. Smetten*, 11 Q. B. Div. 267.

2. The act of Congress prohibiting gift enterprises is constitutional. This question does not arise if the scheme of the trading stamp company amounts to a gift enterprise or a lottery, since Congress has unquestionably authority to legislate on that subject.

3. Section 1177 of the Revised Statutes of the District of Columbia is a valid exercise of the police power. *Munn v. Illinois*, 94 U. S. 113; *Barbier v. Connolly*, 113 U. S. 27.

4. The act of Congress of February 17, 1873, prohibiting gift enterprises is a valid and efficacious exercise of legislative power. The act does not single out particular individuals and subject them to special burdens nor does it do so as to some of those engaged in a particular business, as for

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instance the Chinese in the laundry business, which the Supreme Court of the United States condemned in the case of *Son Ming v. Crawley*, 113 U. S. 703. But it subjects all in this particular business to its provisions just as a law relative to the banks and the conduct of banking would subject all in that particular business to its terms. Legislation of like character is to be found upon the statute books of every State. *Vault Co. v. Railroad Co.*, 17 S. W. Rep. 567; *Railway Co. v. Mackey*, 127 U. S. 205; *Railway Co. v. Beckwith*, 129 U. S. 2. The general power of the legislature to regulate occupations and business of all kinds, keeping within the principle that all members of a particular class proposed to be regulated must be equally amenable to the regulations made, has been declared time and again.

Mr. Justice SHEPARD delivered the opinion of the Court:

1. It is not denied that the power of Congress to legislate in respect of matters affecting the public health, safety, peace and morals within the District of Columbia, is the same as that of the State legislatures within their several jurisdictions. It is neither greater nor less; for "all of the guarantees of the Constitution respecting life, liberty and property are equally for the benefit of all citizens of the United States residing permanently or temporarily in the District of Columbia, as of those residing in the several States of the Union." *Kerr v. Ross*, 5 App. D. C. 241, 247, 248; *Callan v. Wilson*, 127 U. S. 640.

The general nature of the police power of the State is nowhere more forcefully stated than in the eloquent words of Mr. Justice Field. He says: "It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety,

health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same rights by others. It is then liberty regulated by law. The right to acquire, enjoy, and dispose of property is declared in the constitutions of the several States to be one of the inalienable rights of man. But this declaration is not held to preclude the legislature of any State from passing laws respecting the acquisition, enjoyment and disposition of property, what contracts respecting its acquisition and disposition shall be valid, and what void or voidable; when they shall be in writing and when they may be made orally; and by what instruments it may be conveyed or mortgaged, are subjects of constant legislation. And as to the enjoyment of property, the rule is general that it must be accompanied with such limitations as will not impair the equal enjoyment by others of their property. *Sic utere tuo ut alienum non laedas* is a maxim of universal application. For the pursuit of any lawful trade or business the law imposes similar conditions. Regulations respecting them are almost infinite, varying with the nature of the business." *Crowley v. Christensen*, 137 U. S. 89.

Speaking for the same court, some years before, Chief Justice Waite said: "Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals." *Stone v. Mississippi*, 101 U. S. 818.

In a case involving the regulation of the trade of plumbing in the District of Columbia, we had occasion to say: "It is not an easy matter to draw the line beyond which this

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power of regulation of trades and business may not be extended, in the interest of the public health and safety, without becoming an unwarranted invasion of private right. Each case must depend upon its own peculiar circumstances and conditions. Whilst much is left to the discretion of the legislature and its exercise thereof will not be lightly disturbed, yet the final question whether the trade or calling is of such a nature as to justify police regulation, and when conceded to be such the length to which such legislation may be rightfully extended, is unquestionably to be finally determined by the courts." *Kerr v. Ross*, 5 App. D. C. 249.

In matters of this nature, the discretion of the legislature is very large, and every fair presumption is to be indulged in favor of power as exercised. *Powell v. Pennsylvania*, 127 U. S. 678, 684, 685.

It is only, therefore, in a case where the statute purporting to have been enacted for the protection of the public health, safety, peace, and morals "has no real or substantial relation to those objects, or is a palpable invasion of the rights secured by the fundamental law," that the courts will declare it void. *Mugler v. Kansas*, 123 U. S. 623, 661; *Yick Wo v. Hopkins*, 118 U. S. 356, 373; *Powell v. Pennsylvania*, 127 U. S. 678, 684; *City of Baltimore v. Radecke*, 49 Md. 217.

2. In the light of the doctrines above enounced, it remains to consider the nature and scope of the statute under which the information in this case was presented, with the objections thereto, in application to the facts hereinabove set forth.

Now, whilst the information charges the defendants with the offence, in general terms, of engaging in a "gift enterprise" we are, nevertheless, spared the consideration and determination of the common or technical meaning of that phrase because the act of Congress under which the prosecution is maintained itself undertakes to define the character of acts comprehended therein.

With a view to raising revenue from this and other

sources, the Legislative Assembly of the District of Columbia on August 23, 1871, passed an act, the 25th section of which (said to have been copied from a revenue act of Congress then in force) reads as follows:

“The proprietors of gift enterprises shall pay one thousand dollars annually. Every person who shall sell or offer for sale any real estate or article of merchandise of any description whatever, or any ticket of admission to any exhibition or performance, or other place of amusement, with a promise, expressed or implied, to give or bestow, or in any manner hold out the promise of gift or bestowal, of any article or thing, for and in consideration of the purchase by any person of any other article or thing, whether the object shall be for individual gain or for the benefit of any institution of whatever character, or for any purpose whatever, shall be regarded as a gift enterprise: *Provided*, That no such proprietor, in consequence of being thus taxed, shall be exempt from paying any other tax imposed by law, and the license herein required shall be in addition thereto.” (Laws of the District of Columbia, 1871-’72, part II, pp. 96, 97.)

After less than two years’ experience of license there came a complete revolution of public policy as declared by Congress. That which had been permitted and made a source of revenue was then prohibited as an offence. On February 17, 1873, an act was passed entitled “An act prohibiting gift enterprises in the District of Columbia,” 17 Stat. 464. This was embodied in the Revised Statutes for the District of Columbia becoming Sections 1176 and 1777 thereof, as follows:

“SEC. 1176. So much of the act of the Legislative Assembly of the District of Columbia entitled ‘An act imposing a license on trades, business and professions practiced or carried on in the District of Columbia,’ approved August twenty-third, eighteen hundred and seventy-one, as authorizes gift enterprises therein, and licenses to be issued therefor, is disapproved and repealed, and hereafter it shall be

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unlawful for any person or persons to engage in said business in any manner as defined in said act or otherwise.

"Sec. 1177. Every person who shall in any manner engage in any gift enterprise business in the District shall, on conviction thereof in the Police Court, on information filed for and on behalf of the District, pay a fine not exceeding one thousand dollars or be imprisoned in the District jail not less than one nor more than six months, or both, in the discretion of the court."

3. The first contention on behalf of the plaintiffs in error, in respect of the operation of the above statute, is that it is so general in its scope as, necessarily, to comprehend, and undertake to punish as offences, acts that are matters of common, private right clearly beyond the power of Congress to prohibit or to interfere with in any manner, under the guarantees of the Constitution; and that this forbidden purpose and operation are inseparable, save by construction only, from the operation upon those acts which, with equal clearness, are within the power to prohibit and punish.

It is argued, therefore, that the forbidden operation being inseparable from that which is permissible, the whole act must be declared void in accordance with the doctrine of the Supreme Court of the United States in the following cases: *United States v. Reese*, 92 U. S. 214, 221; *Trademark Cases*, 100 U. S. 82, 95; *United States v. Harris*, 106 U. S. 629; *Baldwin v. Franks*, 120 U. S. 678, 685. With the exception of the *Trademark Cases*, those were all cases of criminal prosecutions under sections of the Revised Statutes relating to conspiracies to deprive citizens of the United States of certain legal rights, etc., and it was plain that Congress had exercised powers not conferred by the Constitution and its amendments, and thereunder had undertaken to punish, as offences against the authority of the United States, acts which, in general, were cognizable in the State courts only as crimes against the State. The court declined to limit the sections by construction, so as to make them embrace those acts only

that would, when committed under certain conditions, come within the Federal jurisdiction. To do so, it would have had, as was said in *Reese v. United States*, 92 U. S., p. 221, "to introduce words of limitation into a penal statute;" and as was said later in *Trademark Cases*, 100 U. S., p. 98, "it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body."

In the case at bar, there is no question of conflicting State and Federal jurisdictions, or of constitutional prohibition of any interference whatsoever in the subject-matter of legislation; but merely a question as to the degree or length to which an acknowledged power may be extended.

We think, therefore, that this case must fall within another rule of statutory construction equally well established as the former. Sections 102 and 103, Revised Statutes, providing a punishment for witnesses who refuse to answer questions propounded in the course of an investigation instituted by Congress, afford an example.

In a case arising under those sections it was said by the Chief Justice in delivering the opinion of this court:

"It has been strongly urged in argument that the terms of the section, 102, are sufficiently broad and comprehensive to include a class of witnesses protected and exempted by the provisions of Article V of the Constitution, and especially so when read, as urged it should be, in connection with the next succeeding section, 103, of the Revised Statutes; and therefore the section is void *in toto*. But it is not pretended that the appellant belongs to the class of witnesses contemplated by the article of the Constitution referred to; and if the contention of the appellant were conceded to be correct, as applied to a class of witnesses under different conditions, it would not follow necessarily that the statute should be stricken down in its entirety, because it may be susceptible

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of an unconstitutional application in certain cases that may possibly arise. This is not reasonable, nor is it in accordance with the rule of interpretation adopted by the Supreme Court of the United States, as applied to a statute good on its face, but where, by reason of its general and comprehensive terms, it may be made, by construction, to apply to objects forbidden by the Constitution. In such case the statute will be allowed its full force and operation, as applicable to all cases, rightfully and constitutionally within its provisions, but such application will be restrained as to those objects simply to which the statute is forbidden to extend. This is the rule, as we understand it, upon which the Supreme Court acted in the *State Freight Tax Case*, 15 Wall. 232; *Supervisors v. Stanley*, 105 U. S. 305, 313; *Virginia Coupon Cases*, 114 U. S. 269, and other cases that could be cited." *Chapman v. United States*, 5 App. D. C. 122, 131; see also *In re Chapman*, 166 U. S. 667.

The comprehensive scope of the police power, as exercised in our day and under our form of constitutional government, has been developed by the process of evolution. Rapid increase in population, wonderful inventions, from time to time, followed by vast material development and advances in the arts of civilization, have introduced novel situations and begotten difficulties for the solution of one generation, that were unanticipated and often undreamed of even by the most advanced minds of the generation next preceding. As a necessary consequence, the boundaries of the police power in its application to the property, business and personal liberty of the individual citizen have never been definitely settled so as to furnish a certain guide for all cases as they may present themselves for legislative or judicial determination. Hence, as we have seen above, in the quotation from the opinion of Chief Justice Waite, the want of success of the many attempts "to give an abstract definition of the power itself which will be in all respects accurate." Whilst the existence, or the absence, of power

in the legislature to regulate, or to prohibit, is, in many instances, perfectly plain, there is a border line between the two, the accurate delimitation of which presents the difficulty. Special circumstances, under new or different conditions, give rise to new applications that must remain uncertain until settled by judicial determination in an actual case. If strict accuracy of definition and certainty of application be required in each exercise of the power by the legislature, so as to prevent the inclusion by possible construction, of something not within that power, there would be few laws creating new offences in response to newly-developed public needs, that would escape condemnation.

It is the duty of the courts to take a liberal view of the situation presented to the legislature in such cases, and to give its acts providing therefor "a sensible construction such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." *Law Ow Bew v. United States*, 144 U. S. 47, 59; *In re Chapman*, 166 U. S. 667.

4. We do not feel called upon at this time to undertake a specification of the particular conditions in which the act under consideration might or might not apply to actual merchants in the ordinary course and practice of competitive business, or to determine just what character of inducements by way of gift or premium may, and may not, be held out to purchasers at the time, and as a part of their purchases. That it was not intended to apply to ordinary discounts for cash, or in proportion to amounts of purchases when made by the merchant himself to his customers, may be regarded as certain; and the exercise of such power would doubtless be denied if expressly attempted. Nor can it with reason be said to apply to *bona fide* co-operative associations and the like. It is possible also that it might not be operative in a case where the sale of a lawful article is accompanied by a gift of something specific and certain,

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not attended with any element of chance, and where the gift is not the real object of the sale, in an attempt to evade acts regulating or prohibiting a particular traffic, as, for example, in the case of *Lauer v. The District of Columbia* (recently decided), *ante*, p. 453.

Some cases have been cited by counsel wherein such sales were either held not to be embraced in the statute, or, if comprehended, to render it void. The statutes involved were not, in all respects, like ours, but it is unnecessary to point out the differences, in the view that we take of the application of those cases to the grounds of decision in this case.

(1) *Yellowstone Kit v. The State*, 88 Ala. 196; S. C. 7 L. R. A. 599. In that case the defendant made a free gift of tickets entitling the holders to chances in a limited distribution of prizes as a means whereby to gather a crowd to whom he offered patent medicines for sale. The distribution of the tickets and the prizes had no connection with the sales and prices of the medicines; and the court held that the act did not constitute a lottery within the meaning of the statute, because there was no consideration demanded or received for the tickets.

(2) *Long v. State*, 74 Md. 565. In that case the Court of Appeals of Maryland reconsidered the conclusion reached on a former appeal (73 Md. 527), and declared the statute void because of its unwarranted interference with the liberty of the citizen. Long was a coffee dealer, and in order to induce customers gave with each package of coffee sold a ticket entitling the purchaser to select a cup and saucer or a plate from a number displayed on a table for examination by intending purchasers.

(3) *People v. Gillson*, 109 N. Y. 395. The facts of that case were substantially the same as those in the case of *Long v. The State*, *supra*, and the statute which made it a crime for a merchant, in selling any article of food, to promise to give the purchaser something else in addition to

the article sold, as a prize or reward for making the purchase, was denounced in vigorous terms and declared void.

(4) *Commonwealth v. Emerson*, 165 Mass. 146. There the statute declared that "no person shall sell, exchange or dispose of any property, or offer or attempt to do so upon any representation, advertisement, notice or inducement that anything other than what is specifically stated to be the subject of the sale or exchange, is, or is to be, delivered or received, or in any way connected with or a part of the transaction." The defendant was a retail tobacco dealer. He displayed in his window a great number of photographs of distinguished people, and each purchaser of a package of tobacco was permitted to select one of the photographs without further consideration. Nothing was said in respect of the invalidity of such a statute; but the court held that the transaction was not within its prohibition, saying that the terms of the statute "were not intended and do not purport to forbid a sale of two things at once, even if one of them is the principal object of desire and the other an additional inducement which turns the scale."

Without approving or disapproving the foregoing decisions, and reserving our opinion in respect of the application of our statute to the facts involved therein until such time as a case may be presented demanding it, we can pass them by as having no necessary bearing upon the case of these plaintiffs in error.

In like manner, we think this case may be decided without reference to the numerous decisions cited by counsel for the District, in each of which the element of chance in the distribution of gifts and prizes was the controlling fact.

Without the necessity of declaring that the acts proved in this case constitute the conduct of a lottery or gift enterprise, as those words are commonly understood, or even of finding that the element of chance operates intentionally and distinctively in the scheme of the Trading Stamp Company, we think, nevertheless, that they come within the

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prohibition of the statute, which, as before said, furnishes its own definition of "gift enterprise."

Although one of the most shrewdly planned of the many devices to obtain something for nothing, and one apparently entirely novel, it could hardly have come more clearly within the scope of the statute had it been well known and expressly in the contemplation of Congress at the time of the enactment.

The Washington Trading Stamp Company and its agents are not merchants engaged in business as that term is commonly understood. They are not dealers in ordinary merchandise, engaged in a legitimate attempt to obtain purchasers for their goods by offering fair and lawful inducements to trade. Their business is the exploitation of nothing more or less than a cunning device.

With no stock in trade but that device and the necessary books and stamps and so-called premiums with which to operate it successfully, they have intervened in the legitimate business carried on in the District of Columbia between seller and buyer, not for the advantage of either, but to prey upon both. They sell nothing to the person to whom they furnish the premiums. They pretend simply to act for his benefit and advantage by forcing their stamps upon a perhaps unwilling merchant who pays them in cash at the rate of \$5 per thousand. The merchant who yields to their persuasion does so partly in the hope of obtaining the customers of another, and partly through fear of losing his own if he declines. Again, a limited number only (an apparently necessary feature of the scheme) are included in the list for the distribution of the stamps, and other merchants and dealers who can not enter must run the risk of losing their trade or else devise some other scheme to counteract the adverse agency.

The stamps are sold at the rate of fifty cents per hundred to the contracting merchants, and yet purport to be redeemable with premium gifts at the assumed value of one dollar

per hundred. Unless, therefore, the so-called premiums to be distributed among the diligent collectors of stamps are grossly overvalued, the scheme can not maintain itself, for in addition to the actual cost of the premiums it has to bear the cost of the books and stamps and the maintenance of its office and exhibition room.

If its premiums should have any fair value, then the Stamp Company must inevitably rely upon the failure of the presentation of tickets for redemption by reason of its requirement that not less than 990 tickets—representing cash purchases of \$99.00—shall be pasted in a book and produced at one time to entitle the holder to his premium. In this event, the company, if it actually contemplates making good its contracts, is relying upon a lottery; that is to say, the chances and advantages of its game for its expectations of profit or gain.

There is not a shadow of rational foundation for the Stamp Company's claim that it confers a benefit upon buyers by procuring for them an actual discount. If its business were continued and its contracts faithfully performed, its inevitable result would be, as in all unnecessary interventions of third persons, or "middle men," between producer and consumer, an increase of cost to the latter.

The prohibition of such a scheme is clearly within the power of Congress, within this District, and the statute under which the prosecution has been maintained makes ample provision for its exercise.

5. The appeal of the defendant Lansburgh must abide the result of his co-defendant's. Their cases are inseparable. Although a regular merchant of the city of Washington, he does not appear on this record as convicted of the offence of offering a discount, a premium or a gift to his own customers upon sales made to them in the course of his business, and he cannot make that defence. By his contract and its attempted performance he made himself the accomplice of the manager of the Washington Trading

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Stamp Company—an active party in the promotion of its unlawful scheme; and for that offence alone he has been convicted.

We find no error in the proceedings in the Police Court; and the judgment must be affirmed, with costs.

*Affirmed.*

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## THE DISTRICT OF COLUMBIA

v.

SULLIVAN.

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### STREETS AND HIGHWAYS; MUNICIPALITIES; NEGLIGENCE; PROXIMATE AND REMOTE CAUSE.

1. The District of Columbia as a municipal corporation and the Commissioners of the District representing the corporation have the care and charge of, and the exclusive jurisdiction over, all the public roads and bridges outside the limits of Washington and Georgetown, as well as the care and control of the streets and avenues of the city; and the corporation is liable for injuries to persons arising from the negligence of its officers and agents in constructing and maintaining in safe condition for the use of the public, the streets, avenues, alleys, public roads, bridges and all public sidewalks of the city and the District.
2. A municipality may be liable in the first instance for a defect in its streets or highways caused by the negligence of a street railway corporation occupying an undue and unnecessary portion of the way.
3. Where a person in the exercise of reasonable care is struck and injured by the car of an electric railroad company (the tracks of which were located under the direction and supervision of the District of Columbia), while walking on a sidewalk, negligently laid after the road was in operation in such close proximity to the track that cars running thereon projected one or two feet over and upon the sidewalk at the point where the accident occurred, the negligence of the District can not properly be said to be a remote and not the proximate cause of the injury, and the District is primarily liable.

No. 684. Submitted October 13, 1897. Decided December 8, 1897.

HEARING on an appeal by the District of Columbia from

a judgment on verdict in an action to recover damages for personal injuries. *Affirmed.*

The facts are sufficiently stated in the opinion.

*Mr. S. T. Thomas*, Attorney for the District of Columbia, and *Mr. A. B. Duwall*, Assistant Attorney, for the appellant:

1. The location of the sidewalk was not the proximate cause of appellee's injury; there was an immediate and efficient cause which intervened, over which appellant had no control. The proximate cause of the injury was either the appellant's negligence or his collision with the railroad car. The location and size of the board walk was not the cause of his misfortune; it was a mere condition. *Causa proxima non remota spectatur.* The situation of the board walk and the railroad tracks in question is identical with that on the streets of the city. These streets are concreted from curb to curb; the public is thus invited to use them. But the streets are occupied by railroad tracks. By what possibility could the appellant be held liable by a person using the streets for damage from being struck by passing cars? The curb of the sidewalks of the city are coterminous with the roadway; the hubs and swingletrees of wagons project over the sidewalks when wagons are driven, as they rightfully may be, close to the curb; is it possible that the appellant would be liable for damages to a person standing on the sidewalk or curb, who may be injured by these projections of a wagon driven close to the curb?

The rule of liability is laid down by the Supreme Court as follows: "When one of several successive causes is sufficient to produce the effect (for example, to cause a loss), the law will never regard an antecedent cause of that cause, or the *causa causans*." Casual or unexpected causes are remote. *Insurance v. Transportation Co.*, 12 Wall. 199; *Scheffer v. Railroad Co.*, 105 U. S. 249; *Railway Co. v. Kellogg*, 94 U. S. 475; *Insurance Co. v. Tweed*, 7 Wall. 52; 16 Am. & Eng. Enc. Law 429, *et seq.* The injury to appellee was neither the

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## Argument of Counsel.

natural nor probable consequence of the construction of the board walk. No such injury as overtook him had ever occurred at this point.

A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow. The natural consequence of an act is the consequence which ordinarily follows from it—the result which may reasonably be anticipated from it. *Railroad v. Elliott*, 12 U. S. App. 381; *Lewis v. Railroad*, 54 Mich. 61. While the question of proximate cause generally is for the jury, nevertheless, where, as in this case, there are no disputed facts, it is for the court. The question should not have been submitted to the jury, and the court erred in submitting it. *Pike v. Railroad*, 39 Fed. Rep. 255; *Railroad v. Trich*, 117 Pa. St. 390; *Scheffer v. Railroad Co.*, 105 U. S. 249. An injury caused by negligence and an accident not being prevented by negligence are very distinct in operation and effect. There may be liability in the one case, but not in the other. *Beall v. Athens*, 81 Mich. 538. If it was negligence for the defendant to have laid the board walk so close to the railway as it did, and there was also negligence on the part of the plaintiff, and the negligence of each was the proximate cause of the injury, then no action can be maintained. *Trow v. Railroad Co.*, 24 Vt. 487.

2. The appellant was guilty of no breach of duty in the construction of the board walk; it was lawfully constructed as and where it was; there was no duty on the municipality to put it elsewhere or to make it wider.

*Mr. J. Coleman, Mr. Campbell Carrington and Mr. Irving Williamson* for the appellee:

1. It is the duty of the city to so construct its sidewalks that they will be reasonably safe against accident. *D. C. v. Boswell*, 6 App. D. C. 402; *D. C. v. Haller*, 4 App. D. C. 405; *D. C. v. Bolling*, 4 App. D. C. 397; *Gas Co. v. Poore*, 3 App. D. C. 127; *D. C. v. Woodbury*, 136 U. S. 450, 463.

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2. The appellee had a right to assume that the sidewalk was so constructed as to permit him to walk with safety where he was walking at the time of the accident. *D. C. v. Haller*, 4 App. D. C. 405.

3. The injury to the appellee would not have happened but for the negligence of the appellant in so constructing its sidewalks that the cars of the railway company, when in motion, extended over and upon it. This was a result that the appellant could have anticipated and guarded against, and hence is liable to the appellee for any injury he may have sustained. The appellee has a right of action against either the railroad company or the appellant. *Insurance Co. v. Tweed*, 7 Wall. 44; *Railroad Co. v. Kellogg*, 94 U. S. 474; *Insurance Co. v. Boon*, 95 U. S. 117; *Railroad Co. v. Hickey*, 5 App. D. C. 436; *Shearman & Redfield on Neg.*, Sec. 34; *Patterson on Railroad Law*, 39.

It is elementary law in such cases, that the person first in fault, is not released from liability by reason of the negligence of another. 16 Am. & Eng. Ency. L. 446; *Centerville v. Cook*, 129 Ill. 152; *Eaton v. Railroad Co.*, 11 Allen, 500; *Palmer v. Andover*, 2 Cush. 600; *Atkinson v. Railroad Co.*, 60 Wis. 141; *Small v. Railroad Co.*, 55 Iowa, 582; *Railroad Co. v. Frich*, 117 Pa. St. 390.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

This action is brought against the District of Columbia, a municipal corporation, to recover for personal injuries sustained by the plaintiff, caused, as it is alleged, by a defectively and negligently constructed sidewalk along a part of what is known as the Tenallytown road, one of the public roads or highways within the District of Columbia. It is alleged and shown in proof, that the plaintiff, while walking along the sidewalk about 9 o'clock in the evening of the 14th of August, 1896, was compelled to walk near the edge of the sidewalk next to the street railway track, on which were running certain electric motive cars, and while so passing on

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the sidewalk he was struck by a passing car on the track and seriously injured. It is not denied that the street or road upon which the cars were running was and is one of the public roads or highways of the District of Columbia.

It is alleged in the declaration that the Georgetown and Tenallytown Railway Company, incorporated by an act of Congress which went into effect August 22, 1888, and amendment thereto, approved March 24, 1890, was permitted by said act of incorporation, by and with the consent of the defendant, duly had and obtained, to run and operate its line of railway along and in the highway or public street known as the Tenallytown road, and that said railway company, under the authority aforesaid, and with the consent of the defendant, made and operated their railway in the highway at the point where the accident occurred. That the railway company had constructed their railway, as aforesaid, and while they were running and operating the same, the defendant, acting through its Commissioners and officers, built and constructed a wooden sidewalk about three feet in width along and by the side of the track of said railway, and in such close proximity thereto that the cars of said company, while being run on said railway, projected over and upon the sidewalk for a distance of from one to two feet at the place where the accident happened. That the plaintiff, while passing along and over the sidewalk, and while in the exercise of due and proper care and caution, was run into, upon and against by the cars of the said Georgetown and Tenallytown Railway Company, while running at rapid speed; by means whereof the plaintiff was thrown down upon the sidewalk, etc., whereby he sustained serious injuries.

By the act of Congress incorporating the Georgetown and Tenallytown Railway Co., the company was clothed "with authority to construct and lay down a single or double-track railway, with necessary switches, turnouts and other mechanical devices for operating the same by cable or

electrical power, for carrying passengers in the District of Columbia, from the Potomac river near High street, to and along High street in Georgetown to the Tenallytown road, but *wholly outside of the limits of said road*, and along the side of the said road to the District line. . . . Said railway shall be constructed of good materials and in a substantial manner with rails of the most approved pattern, the guage to correspond with that of other city railroads;" *all to be approved* by the Commissioners of the District of Columbia. By the amendatory act of Congress of March 24, 1890, it was provided that the act incorporating the Georgetown and Tenallytown Railway Company should be amended by substituting after the words "and along High street in Georgetown, to the Tenallytown road," the words "*and thence along and in said road*," for the words "but wholly outside of the limits of said road and along the side of said road;" provided that the inner line of rails shall be at the *minimum* distance of eight feet from the centre of the improved roadway; and further, that said railway shall be located on such side of the roadway as may be indicated by the Commissioners of the District of Columbia.

It is alleged and shown in proof that the railway track was laid, and the road was in operation, *before* the sidewalk was constructed; and we must assume that the railway was laid and constructed in accordance with the authority derived from Congress and the approval of the Commissioners of the District of Columbia. There is no evidence in the case to show the contrary. It is shown that the sidewalk, constructed after the railroad was made and in operation, was from three to four feet wide, and that, at the place where the accident occurred, the side of the car, or the running board thereof, projected over the edge of the sidewalk some five and three-fourths inches. There is no dispute as to the fact that the plaintiff was struck by the projecting part of the car over the edge of the sidewalk, and was injured thereby.

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On the part of the plaintiff it is contended that the accident was attributable to the negligence of the defendant by its officers and agents, in constructing the sidewalk so near to the railroad track as to render passage on the sidewalk dangerous to those who did not know and have in mind the exact relation or distance between the running cars and the outer edge of the sidewalk. While on the part of the defendant it is contended that the principle of remote cause applies, and that, as the proximate cause of the accident was the act of the railway company in running against the plaintiff while passing on the sidewalk, and thereby causing the injury, the railway company, and not the defendant, is liable.

The material facts of the case are but few, and admit of little or no dispute. The court instructed the jury very fully as to the principles of law applicable to the case, and we perceive no error of which the appellant can complain. In the two prayers for instruction granted on request of the plaintiff, and the third of the defendant's prayers, which was granted, the whole law of the case seems to have been fully embraced.

In the one of the two instructions asked by the plaintiff, the jury were directed that if they should find that the sidewalk, at the point where the accident occurred, was constructed at so great a distance from the railroad track that the cars running on said track would not strike a person walking on said sidewalk, then the verdict should be for the defendant; but if they should find from the evidence that the sidewalk was built so near the railroad track at the point where the accident occurred that the cars passing on said track would strike a person walking on the edge of said sidewalk next to the track, and that the plaintiff was struck by a car so passing at the point in question while he was walking on the sidewalk, then it was a question for the jury whether the construction of the sidewalk in such proximity to said track was reasonably safe con-

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struction, and if they should find it was reasonably safe, then there was no negligence on the part of the defendant, and the verdict should be for it; but if they should find that such last supposed construction existed and was not reasonably safe, and that the plaintiff was injured by reason of such unsafe construction *while he was in the exercise of reasonable care, then the verdict should be for the plaintiff.* And by the other instruction granted on the request of the plaintiff the jury were directed that if they found for the plaintiff, they should award him such sum of money as damages as would fairly and reasonably compensate him for such physical and mental suffering and loss of time, if any, as might be found resulted to him in consequence of the injury occasioned by the accident.

The counsel for the defendant offered several prayers, some of which were refused and others were granted; and by those granted the jury were instructed that if they believed from the evidence that the sidewalk, where the injury occurred, was of sufficient width to allow pedestrians to safely travel along the same, and that the plaintiff's injuries occurred by reason of his undertaking to pass between policeman Smith, who was standing on the sidewalk, on the edge thereof next to the railway tracks, when the car was approaching, and was near Shoemaker's store, and that plaintiff knew or could by the use of reasonable care and observation have known that it was dangerous for him to attempt to pass between said Smith and the passing car, and that such deviation on his part was not made necessary by reason of any defect or obstruction in said sidewalk, then the plaintiff was guilty of negligence, and can not recover damages, and the verdict should be for the defendant. And the jury were further instructed at the instance of the defendant that if they believed from the evidence that the plaintiff, by the exercise of reasonable care and caution, could have avoided the accident, then he was guilty of negligence and could not recover in this action, although

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the jury might believe from the evidence that the defendant was negligent in building the sidewalk so near the tracks of the railroad company as that the running boards of the summer cars of the railroad company projected over the edge of the sidewalk.

It thus appears that the jury were fully and fairly instructed as to all the principles involved in the case. And it was plainly made a condition of the plaintiff's right to recover, that the jury should be satisfied from the evidence that he was in the exercise of reasonable care and caution at the time when the accident occurred.

The District of Columbia as a municipal corporation, and the Commissioners of the District representing that corporation, have the care and charge of, and the exclusive jurisdiction over, all the public roads and bridges outside the limits of Washington and Georgetown, as well as the care and control of the streets and avenues of the city. Secs. 246, 247, Rev. Stats., D. C.

And it is held by express and repeated decisions of the Supreme Court of the United States, that the municipal corporation of this District is liable for injuries to persons arising from the negligence of its officers and agents in constructing and maintaining in safe condition, for the use of the public, the streets, avenues, alleys, public roads and bridges, and all public sidewalks of the city of Washington and of the District of Columbia. *Barnes v. District of Columbia*, 91 U. S. 540; *District of Columbia v. Woodbury*, 136 U. S. 450.

This principle is not denied by the defendant, but it is contended that the real cause of the injury complained of is too remote to render the defendant liable therefor; that the immediate and direct cause of the injury was the striking of the plaintiff by the car of the railroad company, and if there be any liability for the injury it should be sought against that company. But this contention can not be sustained. With equal propriety could such contention have been made and sustained in the *Barnes* case, where the rail-

road company, in making a change in the grade of one of the streets of the city, left open a deep pit or excavation, into which the plaintiff, in that case, fell and was injured; or in the Woodbury case, where the hotel company, or the contractors for putting in the boiler, opened and left open the hole in the sidewalk, into which the plaintiff, in that case, fell and was injured. Whatever may have been the liability of the railroad company, in the one case, or the hotel company, or the contractors, in the other, no contention or suggestion was made that the District of Columbia was not liable to the plaintiffs in those cases. The injuries in those cases were sustained, as in this case, by reason of defects in the street and sidewalk, that the municipal authorities were bound to prevent for the safety of the public. It is well settled that where a railroad corporation, in exercising the power conferred upon it by statute, or by municipal authority, to cut through and alter a street or highway, creates a dangerous defect or obstruction in the way, as in the Barnes case, the municipality is *primarily* liable for injuries caused to a traveller thereby. In such case, the question is whether the municipality has the right and power to interfere so as to prevent what is being negligently done; and if it has not such right and power, it is not liable. *Currier v. Lowell*, 16 Pick. 170; *State v. Gorham*, 37 Me. 451; *Willard v. Newbury*, 22 Vt. 458. And it has been repeatedly decided that a municipality may be liable in the first instance for a defect in its streets or highways caused by the negligence of a street railroad corporation occupying an undue and unnecessary portion of the way. *Prentiss v. Boston*, 112 Mass. 43; *Hawks v. Northampton*, 116 Mass. 420. In the present case, the Commissioners of the District were given express authority, by the acts of Congress, to supervise and direct the location of the electric road within the limits of the highway or street, with a view to public convenience and safety, and they certainly had a right to prevent the use of running boards on the cars that would pro-

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ject over the sidewalk to the peril of passengers, to say nothing of the defective construction of the sidewalk itself, erected after the railroad was located and in operation.

Finding no error in the rulings of the court, we must affirm the judgment appealed from; and it is so ordered.

*Judgment affirmed.*

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LYONS v. ALLEN.

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DAMAGES, RELEASE OF CLAIM FOR; RESCISSION FOR FRAUD;  
CONSIDERATION, RETURN OF.

1. Where in an action at law to recover damages for personal injuries a release is pleaded in bar, the plaintiff may show it was procured by fraud; but to avoid the effect of the release, at law as well as in equity, the party seeking to avoid or rescind the instrument must restore the consideration received, or put the other party in *statu quo*; and this principle applies as well in cases of rescission or avoidance on the ground of misrepresentation and fraud as to other cases.
2. And in such a case it is no answer to the objection that the consideration received has not been returned, or offered to be returned, that the amount received by the plaintiff under the release has been discounted from a verdict recovered by the plaintiff below.

No. 708. Submitted October 15, 1897. Decided December 8, 1897.

HEARING on an appeal by the defendants from a judgment on verdict in an action to recover damages for personal injuries. *Reversed.*

The facts are sufficiently stated in the opinion:

*Mr. H. W. Sohn* for the appellants:

1. The testimony of the plaintiff does not show fraud in the release. He does not assert that he did not know he

was executing a release of all claim against the defendants by reason of the accident, but claims that the consideration which he was to receive for the release is falsely stated in the paper—that what he agreed to accept is different from that stated. The release is produced, not for enforcement as an executory contract, but as evidence of an act of the plaintiff. That act having been intentional, with knowledge of its legal effect, and evidenced under seal, requires no consideration to support it, and must stand for what plaintiff intended it. The law is not concerned with the consideration unless unlawful; the statement of the consideration or inducing motive is unnecessary and an erroneous statement can not be fraud in law. *Vandervelden v. Railroad Co.*, 61 Fed. Rep. 54; *Hartshorn v. Day*, 19 How. 211; *Stevens v. Judson*, 4 Wend. 471; *Vroom v. Phelps*, 2 Johns. 177.

2. That plaintiff did not understand the paper, or could not read it, does not entitle plaintiff to avoid it. *Railroad Co. v. Shay*, 82 Pa. St. 198; *Seeright v. Fletcher*, 6 Black. 380; *May v. Johnson*, 3 Ind. 449; *Greenfield's Estate*, 2 Harris, 489; *Hallenbeck v. Dewitt*, 2 Johns. 404. Permitting plaintiff to sign without knowing the contents of the paper can not be considered fraud, in view of his announcement just prior to the execution of the paper that he could read and the absence of a denial of the testimony of Loulan that plaintiff said he understood the paper. If the plaintiff simply executed the release recklessly without understanding it, that would not constitute fraud on the part of the defendant or entitle plaintiff to have it disregarded as a nullity. *Spitz v. Railroad*, 75 Md. 162.

3. The plaintiff received from the defendants five dollars per week for eight weeks, as promised, in consideration for the release, and claims not to have discovered that the payments of five dollars per week were limited to eight weeks, until in the month of March, 1896, the payments ceased. Suit was filed September 3, 1896, and no evidence was offered of the return or tender to the defendants of said pay-

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ments nor any excuse offered for the lack of such return or tender. One who desires to rescind a compromise on the ground of fraud must promptly on the discovery of the fraud restore, or offer to restore, to the other party whatever he has received by virtue of it before bringing suit. *Vandervelden v. Railway Co.*, 61 Fed. Rep. 54; *Gould v. Bank*, 86 N. Y. 75; *Insurance Co. v. Girton*, 124 Ind. 217; *Strodder v. Granite Co.*, 94 Ga. 616; *Pangborn v. Insurance Co.*, 67 Mich. 683; *Brown v. Insurance Co.*, 117 Mass. 479; *Barker v. Railway Co.*, 65 Fed. Rep. 460; *Gibson v. Railroad Co.*, 164 Pa. St. 142; *Drohan v. Railroad Co.*, 162 Mass. 435; *Potter v. Insurance Co.*, 63 Me. 440; *Herman v. Heffenegger*, 54 Cal. 161; *Stewart v. Railroad Co.*, 62 Tex. 246.

In an action at law upon the original claim the plaintiff must show that he rescinded the fraudulent compromise prior to the commencement of the action. If no rescission is shown a final determination by the court that plaintiff was entitled to more than the sum paid is no answer to the objection. *Gould v. Bank*, 86 N. Y. 75.

*Mr. James A. D. Richards* and *Mr. Lorenzo A. Bailey* for the appellee:

1. A release may be shown to be fraudulent. *Russian v. Railroad Co.*, 56 Wis. 325; *Lusted v. Railroad*, 71 Wis. 391, 397; *Schultz v. Railroad*, 44 Wis. 638, 645; *Packet Co. v. Defries*, 94 Ill. 598; *Railroad Co. v. Doyle*, 18 Kan. 59.

2. A release obtained by fraud may be repudiated without refunding the money paid therefor or tender thereof. *Mullen v. Railroad Co.*, 127 Mass. 86; *Mateer v. Railroad Co.*, 15 S. W. Rep. (Mo.) 970, 972; *Railroad Co. v. Doyle*, 18 Kans. 59. The rule as to refunding the money does not apply where the party paying it holds out that it is given for one thing and by fraud obtains an agreement that it was for another. *Mullen v. Railroad Co.*, 127 Mass. 89; 20 A. & E. Enc. 762 *et seq.* What right has one who pays money as a means to perpetrate a fraud upon another to

complain of the loss of it? The jury found fraud in the alleged accord. The money was paid, with fraudulent intent, to establish satisfaction of a fraudulent accord in all which the plaintiff acted in good faith. Under the instructions given them, the jury in their verdict gave the defendants credit for the \$50.00 paid.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

This action was brought to recover for personal injuries sustained by the plaintiff, Eugene A. Allen, occasioned, as he alleges, by the negligence of the defendants, John E. Lyons and Thomas H. Lyons, the present appellants. The defendants were contractors for the construction of a sewer in that part of Washington City known as Georgetown, and the plaintiff was employed as a common laborer on the work; and in the course of his employment and while acting under the immediate direction of one of the defendants, some of the timbers of a scaffold over which he was moving a heavy block of stone, broke and gave way, causing the plaintiff to fall on the arch made in the sewer, and to break his leg. The facts are set out in the declaration substantially as they were proved by the plaintiff. The defendants pleaded the general issue, not guilty, and the trial resulted in a verdict for the plaintiff. The defendants have appealed.

The case was resisted in defence upon three distinct grounds: 1st. That the injury complained of was not produced by the negligence of the defendants; 2d. That such injury was produced by the plaintiff's own fault, or by his contributory negligence; and, 3d. That the defendants had been fully released by the plaintiff for adequate consideration paid, from all possible liability that had accrued or might accrue by reason of the accident and the injury received by the plaintiff.

At the conclusion of the evidence, both plaintiff and

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defendants offered prayers for instructions to the jury, some of which were granted and others refused.

Among those offered by the defendants were two, numbered the eleventh and twelfth, which prayed the court to instruct the jury, that inasmuch as the plaintiff had admitted the execution of the release given in evidence, and that he had received the money specified therein to be paid, as the consideration therefor, and that he had not returned or offered to return the money so received, he could not maintain this action. But the court refused to give such instruction, and instructed the jury that the action could be maintained, notwithstanding the money received by the plaintiff had not been returned or offered to be returned to the defendants. This ruling of the court was excepted to, and it forms one of the principal grounds of error assigned on this appeal. And in the view we have of the case, this question relating to the release and the non-return of the money received thereunder, is the only one that need be decided on this appeal.

The execution of the release is not denied by the plaintiff, but he seeks to avoid its operation by showing that it was obtained from him by fraud and deception. He swears and contends that the terms of the release are not such as he understood them to be when he signed the paper, and that he was imposed upon and misled by one of the defendants, and witness Loulan acting for the defendants, and that he was induced to sign the release containing terms and limitations less beneficial to him than it was represented to contain, and that he would not have signed the paper if he had correctly understood its contents. He says he could not read the paper and was barely able to write his name.

The release was executed by the plaintiff a few days after the accident, while he was confined at the hospital in consequence of his injury. It is dated the 7th of January, 1896, and is under the hand and seal of the plaintiff—the signa-

ture being made by a mark. The terms of the instrument are as follows:

"In consideration of the payment by John E. Lyons and Thomas H. Lyons of the sum of—dollars, the receipt whereof is hereby acknowledged, and of the agreement on their part to pay me the further sum of five dollars per week for every week that I may be compelled to remain in the hospital directly by reason of the injury to my leg received at the accident hereinafter named, not exceeding on the whole, however, more than eight weeks, I do hereby release, exonerate, acquit, and forever discharge the said John E. Lyons and Thomas H. Lyons, individually or as copartners, trading as Lyons and Brother, from any right, claim, or demand of any kind which I have or may or might have against them or either of them, as individuals or partners, for or on account of any injury, loss, or damage sustained or to be sustained by me by reason of the accident at the Potomac Street sewer, on Potomac near Grace street, in that part of the District of Columbia known as Georgetown, or for or on account of any cause or matter whatever, hereby declaring myself fully paid therefor."

The plaintiff testifies that he could not read the release when presented to him, but when read to him he distinctly refused to agree to the terms stated therein, and that it was distinctly understood that he was to receive \$5 per week until he was able to work as he had done before he was injured, and he supposed the release had been changed to express that meaning, and not, as recited in the release now produced, that he should receive \$5 per week while remaining in the hospital, not to exceed in time more than eight weeks. It is in this alleged discrepancy as to time between what is contained in the release and what the plaintiff says that it was understood that it should be, that he was deceived and misled. He admits that he intended to execute the release, and he also admits that the defendants paid him \$50 on the agreement in sums of \$5 for each of ten

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weeks after the date of the release; but he says that the agreement as expressed in the release is not what he thought it was. He admits that he knew that the money he received was for executing the release; and it is conceded that he has never returned, or offered to return, the money thus received. He has not recovered his ability to work such as he possessed before the injury received.

Of course, if there was no fraud in procuring the release, and the plaintiff voluntarily executed it, it at once formed a complete bar to the action. And even if the plaintiff were deceived in the execution of the instrument, but afterwards, and when fully informed of the contents of the release, and all the facts attending its execution, he ratified the release, he would be bound by it. But if the release was, as contended by the plaintiff, procured from him by any fraudulent device or deception, and he has not subsequently ratified it, he may show the facts in evidence, and avoid the release in an action at law, when set up as a bar to the action. Formerly, this right of avoiding a release under seal, on the ground of fraud, in an action at law, when set up as a defence to the action, was generally denied, and the party was referred to a court of equity, in jurisdictions where the remedies at common law and equity are separate.

But it is now generally held, by a great preponderance of authority, that a release so set up as a defence may be avoided at law. It is a condition, however, to the exercise of the right so to avoid the effect of the release, at law as well as in equity, that the party seeking to rescind or avoid the instrument must restore the consideration received, or put the other party in *statu quo*; and this principle applies as well in cases of rescission or avoidance on the ground of misrepresentation and fraud as to other cases. *Bartlett v. Drake*, 100 Mass. 174, and cases cited. It would seem to be but right and just, that a party after accepting a certain sum in settlement of an unliquidated claim for damages under a contract or release, and afterwards seeks to pursue

principle, as established by the authorities, is well  
by the Supreme Court of Massachusetts, in the case  
*Wright v. Lake Shore, &c., R. Co.*, 162 Mass. 435. In  
case, the question was as to the effect of retaining  
y paid for a release, obtained under such circumstances  
uld have entitled the plaintiff to avoid the same; and  
ourt, upon full consideration of all the authorities, in  
inion, said: "As, however, the ruling of the court pro-  
d upon the ground that the action could not be main-  
d without first tendering back the money received, we  
ed to consider this point.

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he was blind and illiterate, and that he was induced to affix his mark to the paper by fraudulent representations that the money was given to him as a gratuity, and to support him until the trial, and without prejudice to his claim against the defendant. The court held that, if the jury believed this evidence, it was not necessary for the plaintiff to pay the money back. In other words, the decision was, that if the payment was a gratuity, or related to a part only of the cause of action, it was not necessary to return the money, so far as the rest of the cause of action was concerned."

In the recent case of *Girard v. St. Louis Car Wheel Co.*, 123 Mo. 358, the question here presented was quite fully discussed, but the court of seven judges were divided in opinion, four to three, as to the final conclusion, the majority founding their conclusions upon different views of the case, expressed in separate opinions, neither of which seems to treat the question we are now considering as necessarily involved in the case as then presented; while the minority of three discuss the precise question here presented, regarding it as properly presented in that case, and they held, that when one has received anything of value on a settlement of a right of action, and executed a release therefor, the contract of settlement, although obtained by fraud and misrepresentation, constitutes an insuperable barrier against a recovery at law so long as it is not rescinded or avoided by a return, or an offer to return, of the consideration paid for it. In the opinion of the minority, it is said, "The authorities are almost unanimous in holding that where money or any other valuable thing is paid, on a settlement to obtain a release of any right of action, before the person to whom it is paid and who has the right of action can recover on it, he must return, or offer to return, whatever he has received, if of any value, and this he must do, although the settlement or release was obtained by fraud. And it is also manifest from the decided weight of authority that the offer to

return whatever of value has been received as a consideration for the settlement or release must be made before or at the time the suit is brought, and the contract or agreement, in so far as it lies in the power of the party desiring to do so, rescinded." In support of this principle several cases are cited, and we think the principle thus stated is in all respects correct, and fully sustained by the authorities, those cited, and others not cited.

It is no answer to the objection that the money has not been returned, or offered to be returned, that the amount received by the plaintiff under the release has been discounted from the verdict. Suppose the verdict had been found for the defendants, because of insufficient proof of negligence on their part, or because of contributory negligence on the part of the plaintiff, what would have been the predicament of the defendants in respect to the money paid under the release? Clearly they could have no recourse to recover it back from the plaintiff. The plaintiff can not be allowed both to affirm and disaffirm, according as the case may terminate; he can not affirm for what he has received, and disaffirm and repudiate the release as to the difference between that amount and what he might expect to recover by the verdict of the jury. He must disaffirm and rescind the release *in toto*, if the facts justify him in so doing, and return or offer to return what he has received under it, before bringing his action.

It follows that the judgment must be reversed, and the cause remanded; and it is so ordered.

*Judgment reversed, and cause remanded.*

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Syllabus.

## SCHWARTZ v. COSTELLO.

## EQUITY PRACTICE; FINAL ORDERS.

An order in an equity cause finally determining a collateral matter growing out of and incident to the execution of the original decree in the cause, can not be set aside, vacated or modified by the court on motion or petition filed after the expiration of the term at which the order is made, but is conclusive until reversed on appeal or set aside on a bill of review.

No. 714. Submitted October 21, 1897. Decided December 8, 1897.

HEARING on an appeal by the respondents to an intervening petition in an equity cause, from an order vacating a previous order. *Reversed.*

The facts are sufficiently stated in the opinion.

*Mr. Thomas M. Fields* for the appellants.

*Mr. Henry E. Davis* and *Mr. Chas. Cowles Tucker* for the appellees.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

This appeal is taken from an order of the 3d day of June, 1897, revoking and setting aside a previous order of the 26th day of April, 1897, and after the term of court had closed at which the last-mentioned order was entered; and the question is, whether the order of the 26th of April, 1897, was, in its nature and effect, so far final as to be the subject of an appeal, and therefore beyond the power and control of the court to vacate and set aside the same, upon petition filed after the lapse of the term at which it was passed.

A decree was passed in the principal cause, directing certain personal property to be sold, and trustees were appointed to make the sale. The property was offered but

withdrawn, and John F. Costello afterwards filed a petition in the cause alleging that he was the highest bidder for the property, and praying that he might be allowed to take the property at his bid, offering to comply with terms of sale. In this application he failed. Afterwards he negotiated with the complainants in the cause, the appellants in this appeal, through their solicitor, for the purchase of their interest in the property for \$1,000; and that the decree and a judgment at law should be entered to his use. Papers were regularly drawn as evidence of the transaction, and were filed among the proceedings in court; and John F. Costello paid to the solicitor of the appellants, on the contract, the sum of \$635; and promised to pay the balance without delay. He did not, however, pay the balance; and the appellants, on the 15th of April, 1897, filed a petition in the cause, setting forth the facts, and making John F. Costello a party, and praying for a rescission of the contract of sale, and of all the papers executed and filed in relation thereto, and the petitioners therein proffered a return of the money received on the contract. On this petition a *nisi* order was passed, requiring cause to be shown why the prayers of the petition should not be granted, and due notice of such order was personally served on John F. Costello and his solicitor. But no answer was made, and no notice whatever was taken of the petition of the appellants; and on the 26th of April, 1897, the order was passed rescinding and declaring null the agreement of sale of the 13th of March, 1897, and all papers and orders in relation thereto, as if never made. By this order, after declaring that the prayers of the petition were granted, the court proceeded to declare, that "the paper-writings or orders filed herein and in law cause No. 37,145, on March 13, 1897, are hereby vacated and rescinded and stricken from the records and files of this and said law cause, and for naught held; and it is further ordered that the complainants be, and they are hereby, granted leave to proceed in this and said law cause as if

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such paper-writings or orders had not been executed and filed, as aforesaid, upon their depositing in the registry of this court the net balance of the sum of \$635.00, which they have received, as set forth in their petition, after first deducting therefrom an amount sufficient to fully satisfy and pay their said judgment against the respondent, Jeremiah Costello, in said law cause No. 37,727, together with all interest and costs, and a further amount sufficient to fully satisfy and pay all of the costs of and expenses incurred in this cause, and duly applying said amounts, as aforesaid, and crediting the same of record in this and said law cause," &c.

The April term of the court expired on the 3d of May, 1897; and on May 24, 1897, John F. Costello filed a petition, alleging wrong and surprise to him, praying that the order of the 26th of April, 1897, might be vacated and set aside, and that he be let in to controvert and defend against the allegations contained in the petition of the appellants, upon which the order of the 26th of April, 1897, was founded. On this petition of John F. Costello, a *nisi* order was passed, requiring the appellants to show cause, and they, in response, filed an elaborate answer, assigning many reasons and causes why the prayers of the petition should not be granted. But the court without evidence taken, but acting upon the state of the case as then disclosed by the record, by its order of the 3d of June, 1897, granted the prayers of the petition, and vacated, annulled and set aside the previous order of the 26th of April, 1897; provided that the petitioner, John F. Costello, should at once pay into the registry of the court the sum of \$365, the balance of the \$1,000 that was agreed to be paid under the contract of purchase, together with all costs incurred subsequent to the order vacated.

The question is, as we have stated, whether the court had power thus to vacate and set aside its order, after the lapse of the term at which it was made; and this depends upon the nature and character of the order vacated—whether it

had the elements of finality in it, and whether it was an appealable order.

It is very clear, from the terms of the order of the 26th of April, that it was not an interlocutory order, or an order in the nature of an interlocutory order, but had in it the unmistakable elements of a final order or decree, as to the particular subject-matter upon which it was intended to operate. By the order, the sale to John F. Costello, and all the written evidence connected therewith, were set aside and vacated, and thereupon all the rights of John F. Costello as purchaser were annulled and destroyed. Nor was that all that was definitively determined by that order of the 26th of April. The right to appropriate, of the \$635 paid on the purchase, an amount sufficient to pay off and satisfy the judgment against Jeremiah Costello, upon the allegation that the money paid on the purchase was in fact the money of the judgment debtor, and not that of John F. Costello, was also adjudged.

We do not understand it to be questioned or denied that an order in the nature of a final decree can not be set aside, vacated or modified by the court, on motion, or petition filed after the expiration of the term at which the order or decree was made, and that the only proper mode of proceedings to have such order or decree reversed or set aside, by the court that passed it, after the lapse of the term, is by bill of review, or bill charging fraud in obtaining the order or decree. As said by the Supreme Court of the United States, in *Bronson v. Schulten*, 104 U. S. 415, "It is a general rule of the law that all the judgments, decrees or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record and they may then be set aside, vacated, modified or annulled by that court. But it is a rule equally well established that after the term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set

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aside, modify or correct them ; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court."

The same principle has been asserted in many cases in that court, both as to judgments at law and decrees and decretal orders in equity. *Phillips v. Negley*, 117 U. S. 655; *Cameron v. McRoberts*, 3 Wheat. 591; *McMiekin v. Perin*, 18 How. 507, 511.

It is true, the order of the 26th of April, which was vacated and annulled, on petition filed after the term had expired, was not an original or principal decree passed in the case. But the order vacated was the determination of a collateral matter growing out of and incident to the execution of the original decree, and was certainly a final determination of the particular matter arising upon the petition of the appellants and presented for the decision of the court. The order being in the nature of a final decree as to the particular subject-matter, it was conclusive upon the parties until reversed, and it was appealable, and an appeal was the remedy open to John F. Costello, instead of the application to vacate and rescind the order upon petition. That an appeal will lie in such case is fully settled by a series of cases in the Supreme Court, the most prominent of which are *Blossom v. Milwaukee R. Co.*, 1 Wall. 655; *Minnesota Co. v. Soutter*, 2 Wall. 634; *Hinckley v. Gilman R. Co.*, 94 U. S. 467; *Sage v. Central R. Co.*, 96 U. S. 712; *Williams v. Morgan*, 111 U. S. 684; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207. In these cases it was held that orders passed upon intervening applications, after final decree on

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the original bill, and collateral to and distinct from the general subject of litigation, determining a question of right, were final in their nature, and therefore afforded the right of appeal; and that such orders could not be revoked or vacated by the court below after the close of the term at which they were passed.

It follows that the order appealed from, of the 3d of June, 1897, must be reversed; and it is so ordered.

*Order reversed and cause remanded.*

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EX PARTE MANSFIELD.

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PLEADING; AMENDMENT; APPEAL; JUDGMENT ON MANDATE;  
MANDAMUS.

1. To strike out the entire substance of a declaration, which does not present a case within the jurisdiction of the court, and to insert a different cause of action, though relating to the same subject-matter, is not properly an amendment, but is in effect a new action, and is not allowable.
2. Where on appeal a judgment has been reversed on the ground that the trial court was without jurisdiction because of the amount in controversy, and the cause remanded in order to allow the plaintiff to enter a nonsuit, or upon failure to do so, directing the trial court to dispose of the case in a manner not inconsistent with the opinion of the appellate court, the trial court can not properly allow an amendment of the declaration so as to set up a different cause of action than that set up in the original declaration, although relating to the same subject-matter.
3. If the trial court mistakes or misconstrues a decree of this court, and does not give full effect to the mandate, its action may be controlled either upon a new appeal or by a writ of *mandamus* to execute the mandate of this court.

Original. Submitted October 21, 1897. Decided December 8, 1897.

APPLICATION for a writ of *mandamus* to compel the lower court to enter judgment on the mandate of this court.

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Opinion of the Court.

*Mr. S. F. Phillips* and *Mr. Frederic D. McKenney* for the petitioner.

Mr. Chief Justice ALVEY delivered the opinion of the Court:

This is an application for a *mandamus* to compel the court below to enter judgment in an action therein, in accordance with the mandate of this court heretofore issued in the case of *Mary Sanders Winter and Percy Winter* against *Richard Mansfield*, brought into this court on appeal by *Mansfield*, the defendant, and which appeal was decided at the last term of this court, and in which case the judgment appealed from was reversed, upon the ground of the want of jurisdiction in the court below to hear and decide the case;—the amount shown and declared to be due on the contract at the time of suit brought not being sufficient in amount to support the jurisdiction of the court. The grounds of the reversal are fully stated in the opinion of this court, and the cause was remanded to the end that the plaintiffs in the action might have the opportunity of entering a *nonsuit* of their action, or, upon failure so to do, that the court should proceed in such proper manner to dispose of the case as should not be inconsistent with the opinion of this court. 10 App. D. C. 549.

The action was brought on a contract for money agreed to be paid in weekly instalments; and at the time of the action brought the instalments due were less than the amount to sustain the jurisdiction of the court. Upon reversing the judgment and remanding the cause, and the filing of the mandate of this court in the court below, instead of disposing of the cause as directed by the mandate, and in a way not inconsistent with the decision of this court, the court below, by leave given, allowed the plaintiffs, by way of amendment, to file a new declaration, setting up quite a different contract, and founding the right to recover upon a cause of action essentially different from that declared on in the first

or original declaration; thus making in fact and in substance a new case; and the defendant, though not served with new process in order to give the court jurisdiction, is required to plead or answer to this new declaration. This can not be done. To strike out the entire substance of the first declaration, which did not present a case within the jurisdiction of the court, and to insert a quite different case or cause of action, though relating to the same subject-matter as that of the first declaration, is not properly an amendment, and should not be considered within the rules on that subject. It is in substance and effect a new action. *Shields v. Barrow*, 17 How. 130, 144.

But the question here is, whether there was any power in the court below, under and by virtue of the mandate sent to it from this court, to allow such an amendment to be made as was made by the plaintiffs? The case had been fully decided by this court, leaving nothing to be done but the formal disposition of the cause in the court below in accordance with the decision of this court, and in no manner inconsistent therewith. When the court was held to be without jurisdiction to proceed in the cause, there was nothing left to be done but either to *non pros.* the action, or to enter it dismissed; and that was the disposition of the cause contemplated by this court, and not that there should be a new case made by the filing of new pleadings. If that had been intended, it would have been so declared. It seems to have been the effort and purpose of the plaintiffs, upon the sending down of the mandate, to open anew the case, by a new declaration, introducing a new cause of action, and requiring a new defence to be made by the defendant. This the plaintiffs can not be allowed to do. As said by the Supreme Court, in the case of *Stewart v. Salamon*, 97 U. S. 361, 362, "The rights of the parties in the subject-matter of the particular suit were finally determined upon the original appeal, and all that remained for the circuit court to do was

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to enter a decree or judgment in accordance with our instructions, and to carry it into effect."

The law upon this subject is too well settled to admit of any question. When a case has been taken to an appellate court, and upon review a definitive conclusion has been reached as to the disposition of the case, the court below, upon mandate sent to it, with power to proceed only as directed by the appellate court, and with a view of carrying into execution the mandate and judgment of that court, has no power, in the absence of express provision of statute, to reshape the case, and by the introduction of new matter or a new cause of action and new pleadings, to avoid the operation and effect of the decision and judgment of the appellate court in the particular case.

In the case of the *Sanford Fork and Tool Co.*, 160 U. S. 247, 255, the Supreme Court say: "When a case has been once decided by this court, on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court can not vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. *Sibbald v. United States*, 12 Pet. 488, 492; *Texas and Pacific Railway v. Anderson*, 149 U. S. 237. If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount), or by a writ of *mandamus* to execute the mandate of this court. *Perkins v. Fourniquet*, 14 How. 313, 330; *In re Washington and Georgetown Railroad*, 140 U. S. 91; *City Bank v. Hunter*, 152 U. S. 512; *City Bank, petitioner*, 153 U. S. 246. But the circuit court may con-

sider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. *Hinckley v. Morton*, 103 U. S. 764; *Mason v. Pewabic Co.*, 153 U. S. 361; *Nashua and Lowell Railroad v. Boston R. Co.*, 5 U. S. App. 97. The opinion delivered by this court, at the time of rendering its decrees may be consulted to ascertain what was intended by its mandate; and, either upon an application for a writ of *mandamus*, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly." 12 Pet. 488, 493; 14 Pet. 51; 94 U. S. 498; 148 U. S. 228, 238, 244.

In the case of *Hickman v. Fort Scott*, 141 U. S. 415, it was held that an application to a court of law by the plaintiff, after its judgment has been reversed and a different judgment directed to be entered, to so change the record of the original judgment to make a case materially different from that presented to the court of review, was properly denied. In that case, the application was by the plaintiff, after the Supreme Court had reversed the judgment and ordered the mandate; and by the application the plaintiff prayed for leave to so amend as to enable him to bring upon the record certain findings of fact which had been either unavoidably or accidentally omitted. But the court said there was no precedent or principle for the allowance of such an application.

And so in the case of *Ex Parte Dubuque & Pacific R. Co.*, 1 Wall. 69, where the Supreme Court had reversed a judgment of a circuit court and remanded the cause with a mandate that the court should enter a judgment for the other party, and the court below had thereafter received affidavits, showing new facts, and granted a new trial, the Supreme Court, by *mandamus*, ordered it to vacate the rule for a new trial, declaring that the court below had no power to set aside the judgment of the Supreme Court, "its authority extending only to executing the mandate." The same rule

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was enforced by *mandamus* in the case of the *Washington and Georgetown R. Co.*, 140 U. S. 91.

There are cases where, from defective pleading, or the omission to state an existing and essential fact, the appellate court will remand the cause to enable the court below to exercise its discretion in allowing an amendment to be made, in order to cure defects. As where the citizenship of the defendant was, in fact, such at the commencement of the suit as to give the court below jurisdiction, that court can, upon a remand of the case, allow the necessary amendment to be made, and then proceed to trial. *Insurance Co. v. Rhoades*, 119 U. S. 237; *Halstead v. Buster*, 119 U. S. 341. But this is not such case. Here there is nothing on the record to amend by. There was no cause of action shown within the jurisdiction of the court, and the case was finally and completely determined by this court, leaving nothing to be done in the court below, except the entry of a *non pros.* or a dismissal for want of jurisdiction, as shown by the opinion and mandate of this court.

When this application for *mandamus* was first filed in this court, the counsel for the plaintiffs in the court below applied for leave to file a brief in opposition, and for time within which the brief could be presented. That application was granted, and though the time given for filing the brief has long since expired, no brief for the plaintiffs has been presented for our consideration.

Under the circumstances of this case, we shall not make any order requiring cause to be shown why a *mandamus* should not issue as prayed. We assume that when the matter is brought to the attention of the court below that the proper order will be made and the leave to amend will be withdrawn or vacated. If, however, it should hereafter become necessary, the petitioner can move for an order to show cause.

## GWYNN v. GWYNN.

## WILLS; TRUSTS AND TRUSTEES; CONSIDERATION.

A testator gave to his daughter a sum of money in trust to apply the same to the maintenance and education of his grandson away from his paternal home at a school to be selected by the daughter, and provided that if she was hindered by the child's parents in the execution of the trust, the fund should go to her absolutely. Claiming to be so hindered, the trustee wrote to the child's father that she had decided that the fund which by the conditions of the will reverted to her, should be invested by a friend in the child's name to be given him with the accumulated interest upon his reaching manhood, and that such friend would show her how to draw up a paper to insure the payment of the money to the child in event of her death. Subsequently the father wrote to the trustee that he declined to comply with the terms of the bequest and recognized its forfeiture by his son. The father thereafter claimed he had reconsidered and recalled his declination and the trustee claimed he had not done so. On attaining his majority the son filed a bill in equity against the trustee to establish a trust and for an accounting, and this court *held*, reversing the decree of the lower court,

- (1) That the conditions of the bequest were valid;
- (2) That the express declination of the legacy by the child's father was at the time sufficient to justify the defendant's claiming the fund as her own;
- (3) That whether such declaration could be withdrawn by the father within a reasonable time, and the trust thereby reopened against the will of the defendant, *quære*; but if so, the burden of proving such withdrawal was on the complainant, and
- (4) That the expression by the defendant of an intention to invest the fund for the use of the child did not create a trust enforceable in equity, but amounted merely to a promise in favor of a volunteer supported by no valuable consideration.

No. 719. Submitted October 22, 1897. Decided December 8, 1897.

HEARING on an appeal by the defendant from a decree establishing a trust and ordering payment of a sum of money in execution thereof. *Reversed*.

The Court in its opinion stated the case as follows:

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## Statement of the Case.

This is an appeal from a decree establishing a trust and ordering payment of the sum of \$1,000, with interest, from July 1, 1883, in execution thereof.

The complainant, Walter Gwynn, who attained his majority August 21, 1891, filed the bill against his aunt, Mary Gwynn, February 23, 1894. He alleged that he is the grandson of Walter Gwynn, who died testate in February, 1882, and the legatee named in the sixth clause of the will of said Walter Gwynn, which reads as follows:

"Sixth. I give and bequeath unto my daughter Mary Gwynn, the sum of one thousand (1,000) dollars to be by her applied and paid out from time to time, until the said sum has been exhausted for the maintenance and education of my grandson, Walter Gwynn, a son of my son Henry Gwynn, which payments must be understood as meaning only such expense of boarding, clothing, travelling, tuition fees, &c., as will be incident and subservient to his maintenance and education at such place, school or college and at no other as my said daughter Mary may elect, prefer, prescribe and direct, away from the paternal home of my said grandson, Walter Gwynn; and upon no other consideration shall the said sum of one thousand (1,000) dollars, nor any part thereof, be so paid out and applied; in the event of the death of my said grandson Walter, before the said sum of one thousand (1,000) dollars shall have been so paid out for his maintenance, education, etc., as above directed, then the whole sum of one thousand (1,000) dollars, or any part thereof, remaining unpaid and in the hands of my said daughter Mary, I give and bequeath unto her, for her sole use and benefit; or should his parents, or other legally constituted guardian or guardians, restrain, hinder, or in any way prevent my said daughter Mary, from sending my said grandson Walter, as above directed, to such place, school or college, as she may elect, etc., then I bequeath unto my said daughter Mary, for her sole use and benefit, free and discharged of all trusts, the whole of the said sum of one thou-

sand (1,000) dollars, or as much thereof as may be remaining in her hands, resulting from the partial prevention of her literal compliance with the terms, conditions and requirements of this bequest of one thousand (1,000) dollars to her made, for the maintenance and education of my grandson Walter Gwynn."

He further alleged that the defendant, Mary Gwynn, named as trustee in said will, accepted the said trust, and on May 2, 1882, wrote a letter agreeing to pay certain expenses of complainant, who, then a lad of twelve years, was at a school in Maryland under the management of Dr. Kinear. That on May 30, 1882, defendant claimed, without just cause or foundation therefor, that she had been hindered in her attempts to send complainant to a school of her selection; and wrote a letter to complainant's father making the following statement therein:

"I have at once decided that the sum of one thousand dollars, which by the conditions of the will now reverts to me free of trust, and being absolutely free to dispose of it, shall be invested by Mr. Dickinson in Walter's name to be given him, with the accumulated interest, upon his reaching manhood. He will show me how to draw up a paper to insure to him in the event of my death before that time."

That the proviso in the will respecting the selection of a school had not been violated; and at the end of the session of the Kinear school complainant's parents were ready and willing to send him to any school selected by defendant, and she was so informed. That she, "in her eagerness to be rid of said trust and to convert the said sum to her own use, unjustly claimed said forfeiture had occurred, and for the purpose of preventing litigation over the matter at the time and the enforcement of complainant's rights in securing a proper administration of said trust she lulled him and his parents into inaction by the declarations made in her letter of said May 30, 1882, as to the securing of said sum to complainant upon his reaching his majority."

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## Statement of the Case.

That since attaining majority he has called upon defendant for an account as trustee, which has been refused; and he has discovered that she never carried into effect the promise made in the letter of May 30, 1882, to invest said sum for him, and that she never intended to do so, the said promise having been part of a scheme to convert the money to her own use. . The prayers were for a decree (1) requiring defendant to account for said trust fund and for a reference to ascertain when the same came into her hands, disbursements thereof, if any, and so forth. (2) For the establishment of the trust created by the will and for payment of the money with interest.

Defendant answered the bill admitting the will and its probate. She denied that she entered upon the trust because she says that though she communicated with the father of complainant, and informed him that she was anxious to execute the trust, and begged that complainant might be sent to a school in Virginia, he refused his permission and declined to accept the conditions of the trust. That she then wrote to him and notified him that she then claimed the money under the terms and provisions of the will. She admits that she did write to him her intention (and that at the time she had that intention) to have the said sum of \$1,000 invested by Mr. Dickinson in complainant's name. That said sum had not then come into her hands from the estate, and she abandoned the intention and so informed complainant's father. She further says that she again urged complainant's father to permit complainant to receive the benefit of the will by conforming to the conditions thereof, and that he again refused, and to make his former refusal final and decisive wrote to defendant on June 22, 1882, as follows:

"I hereby decline to conform to the terms of a certain legacy contained in the will of the late Gen'l Walter Gwynn for the benefit of my son Walter, the said legacy in such will reverting by forfeit in such case as therein provided."

*Messrs. Gordon & Gordon* for the appellant:

Whatever may have been said by the defendant as to an intention to invest the sum of \$1,000, when it came into her hands, for the benefit of the complainant, that intention was never carried into effect. No fund was invested and no instruction given to Mr. Dickinson. No trust was created by the mere writing, as it was without consideration and incomplete. The matter was merely something to be done in the future, and something not done. The authorities on this subject are positive. *Banks v. May's Heirs*, 3 A. K. Marsh, 436.

In *Swan v. Frick*, 34 Md. 139, the court refused to establish a trust on the voluntary agreement of the settlor, made without consideration, the proposed settlor, at the time, contemplating some further act for the purpose of making it complete. See also *Bagley v. Boulcott*, 4 Russel, 345; *Evans v. Battle*, 19 Ala. 403; *Lloyd v. Brooks*, 34 Md. 27; *Heartley v. Nicholson*, 19 L. R. (Eq. Cas.) 233; *Cotteen v. Missing*, 1 Maddox, 103; *Jones v. Lock*, 1 Ch. App. 25; *Dipple v. Corles*, 11 Hare, 183.

*Mr. Irving Williamson* for the appellee:

If it be contended that the trust, as created by the will, clothed the appellant with discretionary power, then, it is submitted, with confidence, that under the law and case made by the bill and proof, appellant's conduct is subject to examination by a court of equity. 2 Perry on Trusts (4th Ed.), Sec. 511, 519; *Read v. Patterson*, 44 N. J. Eq. 211; *Eldridge v. Heard*, 106 Mass. 582; *Wormley v. Wormley*, 8 Wheaton, 421. In *Colton v. Colton*, 127 U. S. 300, the doctrine is stated that the court will interfere whenever the exercise of discretion by trustees is infected with fraud or misbehavior, and generally where the discretion is mischievously and erroneously exercised. *McDonald v. McDonald*, 92 Ala. 537; *Tempest v. Lord Camoys*, 21 Ch. Div. 571 (578); Hill on Trustees (4th Am. Ed.), top p. 765; *Bound v. S. C. R. Co.*, 50 Fed. Rep. 853.

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## Opinion of the Court.

Under these principles it is clear, that the conduct of appellant was most improper, and any discretion reposed in her has been exercised in favor of her private interest, and such a state of affairs renders her amenable to the decree of the proper court. But under the terms of the trust, the only discretion reposed in the appellant was the selection of a "place, school or college," away from the paternal home of the appellee, where he was to be educated. The forfeiture to her was not dependent upon her discretion; she had a right to refuse to claim a forfeiture, but the question whether this money was to revert to her, in whole or in part, depended upon a fact, which must first transpire. Any erroneous decision by appellant as to the happening of that fact does not bind appellee. No claim of forfeiture can successfully be made that is based upon premature acts or decisions. 1 Lewin on Trusts, \*p. 616; *Moore v. Clinch*, 1 Ch. Div. 447 (453). The purpose of the testator was the education of appellee, in the manner directed. The forfeiture to appellant was a secondary matter. 1 Perry on Trusts, Sec. 328, 427.

The duty of a trustee, such as the appellant was, is clearly shown by the following authorities: 1 Perry on Trusts, Sec. 328, 427; *Bound v. Railroad*, 50 Fed. Rep. 853; *Railroad Co. v. Duvant*, 95 U. S. 578.

Mr. Justice SHEPARD delivered the opinion of the Court:

1. With the motives that prompted the terms and conditions of the clause of the will creating the trust sought to be established, we have no concern, and will not go into the matter further than to say—so as to avoid possible misconception—that the testator was a man of deep and earnest faith in the truths of the Christian religion and deemed his son an unsafe guardian of the education of the grandson, because he regarded him as destitute of such faith. He was dealing with his own estate; the conditions were lawful, and the question is, whether they were in fact re-

jected by complainant's father in a manner such as effectually to bar the claim of the son.

2. It has been contended, on the part of the appellant, that even were it conceded that there had been no forfeiture of the legacy, it could not now be claimed without violence to the purpose and express conditions of the will, and the fund would go to the next of kin, if claimed by them, as an undisposed of part of the estate.

The contention is, that the fund was intended to be expended in the education of the complainant, then a child of twelve years of age, and not to be given to him outright as now claimed. That as the fund was not claimed during the years of usual education in schools and colleges, and no attempt was made during that time to enforce the trust, and as there is no evidence to show that it can or will be used in that way now or hereafter, and there is no prayer for a decree to that effect, the bill ought to have been dismissed. In our view of the evidence upon which the case was submitted, this question need not be passed upon.

3. We find nothing in the evidence to justify the charge in the bill that defendant's statement of intention to have an investment made of the sum of \$1,000 for complainant's benefit was in aid of a scheme to procure the forfeiture of the legacy and to "lull him and his father into inaction."

The extract from defendant's letter of May 30, 1882, copied in the bill, does not fully disclose the situation at that time, and should be read in connection with several sentences immediately preceding it. After referring to information in respect of the contemplated baptism of his children and the gratification of their mother thereat, defendant said: "Your letter reminds me that they are your children, not mine. I will remember this in the future. It is with profound regret that I receive your decision regarding Walter, but if you fear that my influence would be baneful to the sacred relation of father and child, you are right."

This letter, and the final rejection of the legacy on June

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22, 1882, set out in the answer and afterwards proved in the case are the only letters passing between the defendant and complainant's father that have been preserved by either. The fact that this final and unconditional declination of the benefit of the trust was not made until nearly a month after the letter acknowledging and accepting the first declination and expressing the intention to make a settlement of the defendant's own money for the benefit of the complainant, tends to support her statement, as a witness, that she continued, after May 30, 1882, to insist upon the acceptance of the legacy and the fulfillment of its conditions. Her brother admitted that she designated the Alexandria High School, and does not deny that it was unobjectionable as a school for boys. If no such offer or request was made by her after May 30, 1882, then there was no occasion for his positive and unequivocal rejection of the terms of the legacy made in writing on June 22. Nor does he anywhere say that anything more was said to her in regard to her intention of making a settlement upon complainant, or that this final declination was in consideration of, or founded upon, a reliance in her previous declaration of that intention. Denying defendant's statements of her offers between May 30 and June 22, he says that after the latter date, and before the customary commencement of the school year in the fall, he wrote to defendant withdrawing his objection to her acting as trustee under the will and requesting her to proceed with the execution of the said trust. Her reply to this, he says, was a refusal to recognize complainant as any longer entitled to the benefits of the trust. According to this, he had not accepted the substitution of her expressed intention of the settlement, for the trust created by the will, and he does not intimate that she referred thereto in her declaration that the trust of the will had failed or been forfeited. In an attempt, however to account for his failure then, or during his son's minority, to take any step whatsoever looking to the enforcement of the trust, he says that he relied upon

the defendant's fulfillment of the pledge she had made to invest the fund for complainant's benefit, but he does not say that he so informed her.

The contention founded on this evidence is, that the provision for the forfeiture of the benefits of the trust must be strictly construed; that the declination of the legacy, June 22, 1882, having been made at a time when no schools were in session, was premature, and complainant's parents had, at least until the commencement of the school year, the right to reconsider this premature declination and exercise their right to accept. The declination by the father, in June, 1882, was sufficient, at the time to authorize the defendant to claim the fund as her own under the terms of the bequest, and we do not find it necessary to decide whether that declination could be withdrawn in a reasonable time and the trust thereby reopened against the will of the defendant, because we do not find that the evidence raises the point.

In the face of the acknowledged express rejection made in writing, June 22, 1882, the burden was on complainant to show that it had been recalled and reconsidered. His father positively asserts the fact, and the defendant likewise denies it. There is no other direct evidence. The relations of brother and sister were strained. Her first communication to him after the death of their father was through a mutual friend in Baltimore to whom she wrote. This was Mr. Dickinson, to whom she referred later as the person whom she would ask to invest the money for complainant and to prepare the papers necessary to secure it to him. There is no evidence by him or anyone else. As before stated, all the letters passing between brother and sister had been destroyed before the litigation began, save the letter containing the statement in regard to the intended investment, which he preserved, and the declination of the legacy, which has been preserved by her. There is nothing in the evidence to create the suspicion, as regards either party, that this correspond

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ence was destroyed with any other than a proper motive. Nor is there anything that would justify us in giving credence to the brother rather than the sister, on the ground of her interest in the subject matter, for he is as likely, under the circumstances, to be unduly influenced as she. If the money be finally lost to the son, as has been its aid in his education, it will be the result of his father's conduct; and the desire to avoid possible blame therefor would, to say the least, be as potent in its influence upon one's testimony as the mere desire for the money involved. With the evidence evenly balanced the complainant would necessarily fail.

But we can not say that it is evenly balanced, because, in our opinion, the circumstances of the case tend to support the testimony of the defendant. Hers is perfectly consistent therewith; whilst his is not altogether so. Founded, necessarily, on the information given by his father, the complainant's bill sets up two inconsistent claims for relief; first, the trust created by the will; and second, the trust created by the defendant's declaration of the intended investment of the money obtained by her through the failure of the trust of the will. Again, if the father, who needed assistance, as he admits, in the proper education of his son, actually withdrew his declination of the trust created by the will, and considered it thereby enforceable, it is strange that he made no further demand after the fall of 1882, and no protest, and took no steps to compel execution. We do not think it a reasonably sufficient explanation to say that he relied on defendant's fulfillment of her pledge to invest the money for his son's benefit. The withdrawal of the declination of the legacy and the demand for the execution of the trust thereof, constituted an express declination of the offer of investment as a substitute therefor. It is true he preserved the letter containing this "pledge;" but he says that its preservation was accidental. A man of his apparent intelligence could not easily have been misled by the declaration therein;

and the state of feeling between him and his sister at the time was not such as to beget overconfidence and trust.

Her language is plain. She does not say that she has invested the money. She does not say that she holds, and will hold it, in trust. She simply says that she had decided that the money (not his under the trust, but her own by virtue of its rejection or forfeiture), "shall be invested by Mr. Dickinson in Walter's name to be given him with the accumulated interest on his reaching manhood." Then follow the significant words: "He (Mr. Dickinson) will show me how to draw up a paper to insure it to him in the event of my death."\*

No inquiry was ever made of Mr. Dickinson to learn if the investment had been made or the paper drawn; and none was made of the defendant. Had there been inquiry the information would certainly have been obtained (and which defendant says she conveyed in one of her letters) that no money had been delivered to Mr. Dickinson, and that none had been invested, or would be.

4. This brings us to the contention, in support of the decree, founded on the foregoing letter as creating a trust that ought to be enforced by a court of equity. The letter, as we have seen, contained no express declaration that the writer held the money in trust or as a trustee; it contained nothing more than the expression of an intention to make an investment—to create a trust in the future—for the benefit of the complainant. It would do violence to the language used to say that it amounted to anything more than a mere promise, without consideration, to make a gift in the future—to have an investment made of a sum of money, and then to prepare papers to secure the same to the donee.

It is an undoubted proposition that equity will not enforce a contract to create a trust, or any executory contract, that does not rest upon a valuable consideration. The character of the promise or declaration in this case is so

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plain that we do not deem it necessary or important to go into the numerous decisions that have been made in suits for the enforcement of imperfect gifts and incomplete trusts. In addition to the cases cited in the briefs of counsel, see *Richards v. Delbridge*, L. R. 18 Eq. 11; *Kekewich v. Manning*, 1 DeGex, M. & G. 176; *Milroy v. Lord*, 4 DeG., F. & J. 264; *Dennison v. Goehring*, 7 Barr, 175, 178; *Stone v. Hackett*, 12 Gray, 227, 230; 2 Pom. Eq. Jur., Sec. 997, and cases cited.

There has been a general agreement upon the principle above stated, and whatever apparent conflict there may appear in the cases arises wholly out of the peculiar provisions of the instruments to be construed or the effect to be given to certain special facts constituting the alleged trust.

Whenever it has been determined that there has been a perfected gift or transfer of title, equity has enforced it though without consideration. Likewise it has enforced trusts in behalf of volunteers, without regard to the form of words used to declare the intent when they have been found equivalent to the declaration of a complete trust. But in no case, certainly in none that has not been overruled or discredited, will it be found that a mere promise to make a gift or to create a trust in the future in favor of a volunteer, without even a meritorious consideration to support it, has ever been enforced against the promissor.

For the reasons given, the decree must be reversed, with costs, and the cause remanded, with directions to dismiss the bill.

*Reversed.*

## PLATT v. SHIPLEY.

PATENTS; INTERFERENCES; PRIORITY; DUE DILIGENCE; EXCUSABLE DELAY; MISTAKE AS TO SCOPE OF FORMER PATENT.

1. A decision of the Commissioner of Patents awarding priority of invention to S. and H. *affirmed* for the reason that although the rival applicant was the first to conceive, he was the last to reduce the invention to practice, and did not use due diligence in such reduction to practice.
2. A person can not be charged in law with any want of due diligence before the advent of a rival inventor upon the field; but at and after that time he becomes liable to lose the benefit of his previous conception unless he uses due diligence. Delay for the purpose of the elaboration and perfection of a crude conception may well be commended; but it will not be excused where no such end is in view.
3. The fact that a party does not know that a rival has entered the field is no excuse for delay, since the risk that a rival may appear at any time is something which every inventor is bound to contemplate and to anticipate, and in this lies the fundamental reason for the requirement of due diligence.
4. A mistake by a party in supposing that the invention was covered by a prior patent granted to him can not under any known principle of law be considered a good excuse for delay in perfecting the invention or filing an application covering the same. Under the circumstances of this case the applicant is, furthermore, chargeable with the knowledge possessed by his agent or attorney as to the scope of the former patent.

No. 72. Submitted November 8, 1897. Decided December 8, 1897.

HEARING on an appeal from the Commissioner of Patents in an interference proceeding. *Affirmed.*

The facts are sufficiently stated in the opinion.

*Mr. George Cook* for the appellant.

*Mr. William H. Finckel* and *Mr. Charles E. Mitchell* for the appellee.

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Mr. Justice MORRIS delivered the opinion of the Court:

This is an appeal from the decision of the Commissioner of Patents in an interference cause arising out of a controversy between the appellant and the appellees concerning an invention for an improvement in the making of buttons. The subject-matter of the issue between the parties is defined and formulated by the Patent Office as follows:

"1. A button formed with a depressed centre, having secured in the bottom thereof a clinching-die, the lower plate of the latter resting against the bottom of the button proper and serving as a bearing for the upset end of a button-fastener.

"2. A button constructed with a depressed centre having a die located therein and resting against the bottom of the button to act as a reinforce therefor, and a top plate."

As explained by the Examiner of Interferences in the Patent Office, in a statement which seems to be accepted as correct by both parties, the subject of invention is thus described:

"The matter in issue is a button which is to be fastened to a garment by means of a tack driven through the garment into the button-head, and its point upset or clenched by means termed a "die" or "anvil." The feature that lends patentability to this particular button is the form of anvil, which is made crown or dome shaped, with its base, which is provided with an opening for the insertion of the tack, resting upon the back-piece or bottom of the button. This anvil performs two functions when the parts of the button are properly assembled—viz., first, to reinforce the bottom of the button, and second, to upset the end of the tack or rivet. When upset, the end of the tack bears against the bottom of the die."

And the Examiner has also well and concisely stated the situation of the parties. He says:

"Shipley and Hyde are connected with the Scovill

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Manufacturing Co., of Waterbury, Conn., which concern in the year 1893, were making a button under the Bryant patent, No. 482,959, which was found in practice to be defective. To remedy the defect the present invention was made in December, 1893. Experiments were conducted during this month, and in January, 1894, the goods were ready for the market, the first shipment being made February 1, 1894. Thereafter shipments were regularly made and the button has been extensively sold. Two forms are being manufactured by the Scovill Co. In one the anvil is made in two pieces, the lower one of which overlaps and encloses the lower edge of the upper piece, and in the other the anvil is made in one piece. Specimens of the experimental buttons and those which followed and are now manufactured have been offered in evidence. Application for patent was filed February 19, 1894.

"C. M. Platt is one of the oldest of the living inventors of buttons and one of the largest, if not the largest, manufacturer in this country. Although making and selling a large variety of different forms, he has not manufactured this particular button for the market. His application was filed subsequent to the marketing of the button by Shipley and Hyde, and also to their application. His case rests upon the determination of the question whether he reduced the invention to practice in the summer of 1891, as alleged by him; and if this must be answered in the negative, then was he engaged in a diligent prosecution of the invention up to the time application for patent was filed?"

In their preliminary statement Shipley and Hyde state that they conceived the invention about the middle of December, 1892, and at the same time explained the same to others, but no model was then made; but on or about January 4, 1893, they reduced the invention to practice, made a drawing of it for future reference, and prepared to manufacture the article for the trade, and that they have sold it in large quantities since about the middle of May, 1893. Their ap-

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plication for a patent, as already stated, was filed on February 19, 1894.

The appellant, Clark M. Platt, in his preliminary statement, says that he conceived the invention in the early part of the year 1891; that he disclosed the invention to others and made drawings thereof about the month of April, 1891; that he made samples thereof and thereby reduced it to practice about May or June, 1891, and that since the year 1891, he has not manufactured the article for commerce. He filed his application for a patent on May 8, 1894, upward of two months after the application of Shipley and Hyde.

It is conceded by Shipley and Hyde that they made a mistake in the dates mentioned in their preliminary statement, and that their invention was made and reduced to practice, not in December of 1892 and January of 1893, but in December of 1893 and January of 1894, as stated by the Examiner of Interferences. With this correction, however, it is abundantly proved, and it does not seem to be controverted, that they have proved their case in accordance with their statement. It is also satisfactorily proved, and it seems likewise not to be controverted, that the appellant, Platt, had conceived the invention in 1891, long before the conception by Shipley and Hyde, and that in April of 1891 he had made a drawing of it, and had communicated the invention to his nephew and through his nephew, as his agent, to his attorney for the purpose of having an application filed for a patent. But it is also conceded by him that, unless the making of a few samples in May or June of 1891 constitutes a reduction to practice, he never reduced the invention to practice, and he never made any attempt to manufacture the article for commercial use. We have, therefore, the case of independent inventors working on the same line of invention, of whom Platt was beyond all question the first to conceive but the last to apply for a patent, and Shipley and Hyde the last to conceive but the first to place the article in commercial use, and the first to apply for a patent.

Upon the proof in the cause the Examiner of Interferences awarded priority of invention to Shipley and Hyde. Upon appeal, the Board of Examiners-in-Chief reversed this decision and awarded priority to Platt. But upon appeal from the Board to the Commissioner of Patents, the Assistant Commissioner, acting as Commissioner, reversed the decision of the Board, and held with the Examiner of Interferences that Shipley and Hyde were entitled to judgment of priority. From this last decision the cause now comes to us on appeal.

It is claimed on behalf of Platt, first, that he reduced the invention to practice in May or June of 1891 by making at that time some samples of buttons like the subject of the present issue, and, second, that even if that should not be regarded as a sufficient reduction to practice, he was in the exercise of due diligence to prosecute the invention, which he was confessedly the first to conceive, and is therefore entitled to the patent.

With reference to the first position, all the tribunals of the Patent Office have found against the contention of Platt. They have found that there is no sufficient proof in the record to show that the samples made by him in 1891 were buttons corresponding to the issues in this case, and that at most these samples were mere experimental constructions, the unsatisfactory character of which was sufficiently manifested by the fact that the inventor wholly disregarded them as soon as they were produced, and practically threw them away and permitted them to be lost. We think the tribunals of the Patent Office were entirely right on this point, and that no other conclusion than that which they reached could reasonably have been deduced from the testimony. In fact, in the argument before us on behalf of Platt, no great stress was laid upon this point; and while several pages of the brief are devoted to it, no reason has been adduced to shake the unanimous decision of the tribunals of the Patent Office upon the question.

The substantial question in the case is whether Platt,

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being the first to conceive the invention, was in the exercise of due diligence in the prosecution of his invention at the time of the arrival upon the field of a rival inventor and to the time of his application for a patent, so as thereby to overcome the claim of his rival, who was the second to conceive, but who promptly thereupon prosecuted the invention to a successful result, placed it in commercial use, and speedily followed up his action by an application for a patent. And this question, in the light of the testimony, we are compelled, with the Acting Commissioner of Patents, to answer adversely to Platt.

It appears from the record that in the month of April, 1891, Mr. C. M. Platt, immediately upon his conception of the invention, communicated it to his nephew and agent, Mr. I. G. Platt, and that the latter, within a few days thereafter, went to New York to communicate with their attorney with reference to an application for a patent. After consultation with the attorney, it was deemed expedient to make the several features of the invention the subject-matter of three or four different applications, for the purpose of procuring a patent for each one. The application for the first division of the invention, as it is called, was filed on May 16, 1891, and resulted in a patent which was issued on December 15, 1891. The application for the second so-called division was filed on October 26, 1891, and was rejected during the following year, 1892, as having been covered by some previous patent issued to Platt; and the latter, through his attorney, acquiesced in the rejection by the Board of Examiners-in-Chief, and prosecuted the application no further.

It is claimed that thereupon, about the middle of the year 1893, there was discussion between Mr. I. G. Platt and the attorney in New York with reference to the filing of an application for a patent for the third division of the invention, which is the matter of the issue between the parties in these proceedings, and that it was then resolved to make

such application. It appears from the testimony, however, that no application was prepared until the latter part of December, 1893, which is about the same date that is given by Shipley and Hyde for their conception of the invention; that then the papers were sent to Waterbury for examination or revision by Mr. Platt; that after revision they were returned to the attorney in New York; that the latter then prepared them for final execution by Mr. Platt and sent them to him to be executed, and that they finally reached the Patent Office, and were filed, as already stated, on May 8, 1894. This is all that was done by Platt or on his behalf in the matter, except that subsequently, on August 28, 1894, he filed an application for a fourth division of the invention, which in some way not explained, and not necessary here to be considered, was made to cover the matter in issue here also, and was permitted to go to a patent on September 29, 1896.

There is no explanation whatever of the extraordinary delay of Platt, or of those who were acting for him, in postponing for upward of three years the application for a patent for the issue of this interference, if he really had the invention, as he claims, in April of 1891. And yet, of course, he can not be charged in law with any want of due diligence before the advent of a rival inventor upon the field. But at and after that time he undoubtedly became liable to lose the benefit of his previous conception unless he did use due diligence. We fail, however, to find any evidence whatever of greater diligence than had been manifested in the three previous years. As appears from the record, and as has been already stated, all that was done for the four following months was the preparation of the papers for an application for a patent, which might have been accomplished within forty-eight hours, and for which one week would certainly have afforded most ample time. With this dilatoriness we may contrast the action of Shipley and Hyde, who, within less than two months after their conception of the in-

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vention, had reduced it to practice, and filed their application in the Patent Office, and within three months thereafter had placed the manufactured article in large quantities upon the market.

Delay for the purpose of the elaboration and perfection of a crude conception, may well be commended, and we have had occasion to express such commendation. But there was here no such elaboration, in fact no elaboration whatever. The invention is claimed to have been conceived in April of 1891, and with the exception of a few doubtful and unsatisfactory specimens, which were thrown away as useless, there was nothing whatever done thereafter by Platt or on his behalf, except to hold some conferences, and at last prepare the papers for an application. Now, it is impossible in reason to hold that this constitutes due diligence. It has the appearance, rather, of unusual and extraordinary negligence. If the invention was fully conceived, as it is claimed, in 1891, and even then drawings were prepared showing the perfect invention, the preparation of the papers for an application should have required even less than the usual time.

Excuse is sought to be made for the delay on two grounds: first, that Platt did not know that there was any rival in the field; and, second, that he supposed that his patent of 1891 covered the whole invention and the issue of this controversy. But plainly these grounds are unsatisfactory and insufficient. The risk that a rival may appear upon the field at any time is something which every inventor is bound to contemplate and to anticipate, and in this lies the fundamental reason for the requirement of due diligence. And with regard to his understanding of the scope of the patent of 1891, even if that could be allowed as an excuse, which can not be under any known principle of law, such understanding is wholly inconsistent with the conduct of Mr. Platt's attorney, with the knowledge which the attorney had, and with the knowledge which Mr. I. G. Platt must have

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had, with all of which, whether they failed to communicate the fact to him or not, he was fully chargeable under the circumstances.

We must conclude that no sufficient reason has been adduced before us to disturb the decision of the Acting Commissioner, and we think that this decision was amply justified by the record in the cause, and that it should be affirmed. It is accordingly hereby *affirmed, and judgment of priority of invention is awarded to Shipley and Hyde.*

*The clerk of this court will certify this opinion and the proceedings in this court to the Commissioner of Patents, to be entered of record in his office, according to law, and it is so ordered.*

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IN RE APPLICATION OF NEILL.

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PATENT OFFICE PRACTICE; APPELLATE PRACTICE; INTERFERENCES; ANTICIPATION.

1. The practice of the Patent Office is not a matter for regulation by this court; and irregularities therein, even if patent on the record, will only be considered by this court when some substantial right of a party has been denied and the point saved for presentation on appeal.
2. Where appellant claimed that patents were wrongly granted to E., and that after he had adopted E.'s claims his application should have been placed in interference with E., *held* that whether the grant of E.'s patent was right or wrong or capable of satisfactory explanation, and whether an interference should be declared, are matters not within the jurisdiction of this court.
3. If this court had a right to inquire into the propriety of the issue of the patents to E., and it was plain that an error had been committed therein, that would not excuse a similar error in favor of the appellant in order that he might be put in interference with him.
4. After examination of the patents cited as references against

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appellant's claim, *held*, that, considered together, they constitute complete anticipation of the process claimed to have been discovered by appellant, and the decision of the Patent Office *affirmed*.

No. 73. Patent Appeals. Submitted November 9, 1897. Decided December 8, 1897.

HEARING on an appeal from a decision of the Commissioner of Patents refusing an application for a patent. *Affirmed*.

The facts are sufficiently stated in the opinion.

*Mr. James B. Rogers* for the appellant.

*Mr. W. A. Megrath* for the Commissioner of Patents.

Mr. Justice SHEPARD delivered the opinion of the Court:

1. This is an appeal from the decision of the Commissioner of Patents refusing an application of James W. Neill, filed January 13, 1890, for the patent of a method of concentrating pyritiferous ores.

The following are the claims that were rejected:

"1. The process of rendering magnetic nonmagnetic ores of the class specified and then separating such magnetic ores from the gangue or other associated metals or minerals, which consists in first crushing as near as may be the mined or cold ore to a uniform condition of granulation or pulverization, then heating the crushed ore to such temperature as to render the nonmagnetic pyrites magnetic and then magnetically separating the latter from the ore or gangue, substantially as set forth.

"2. The process of separating nonmagnetic pyritiferous ores from gangue or associated metals or minerals, which consists in first approximately reducing the ore to a uniform pulverization or granulation, then heating it to convert the nonmagnetic pyritiferous particles to magnetic particles, and then magnetically separating the latter from the ore or gangue, substantially as set forth.

"3. The process of separating nonmagnetic ores from their

gangue or associated metals or minerals which consists in reducing all the ore to an approximately uniform degree of granulation or pulverization, then drying the same, then heating to convert the nonmagnetic particles to magnetic particles and then magnetically separating the latter from the gangue, substantially as set forth.

"4. The method of concentrating chalcopyrite ores by eliminating magnetically any magnetic material therein while the copper and iron pyrites are nonmagnetic, and then heating the remainder to such a temperature as to render the chalcopyrite magnetic and separating the reduced chalcopyrites magnetically, substantially as set forth.

"5. The method of concentrating chalcopyrite ores, which consists in crushing the ore to disengage the chalcopyrites, iron pyrites, earthy gangue, and magnetic pyrites, magnetically separating the magnetic pyrites, heating the residue, thereby rendering the chalcopyrite magnetic, and magnetically separating the same, substantially as set forth.

"6. The process of separating pulverized chalcopyrite and iron pyrites or other materials which are rendered magnetic by heat from other nonmagnetic material, which consists in heating the mass sufficiently to render the chalcopyrite magnetic and magnetically separating the same, then heating the residue to a higher temperature and magnetically separating the iron pyrites, substantially as described.

"7. The method of obtaining copper and other valuable constituents of chalcopyrite ore, which consists in first concentrating the whole by vanning or otherwise, separating the naturally magnetic material magnetically, then heating the remainder to a temperature sufficient to render the chalcopyrite magnetic and insufficient to render the iron pyrites magnetic, separating the magnetic chalcopyrite magnetically, then reheating the remainder to a much higher temperature to render the iron pyrites magnetic, and separating the same magnetically, leaving the gold, silver, lead, &c., as a final nonmagnetic residue, substantially as described.

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"8. The process of separating magnetic oxide of iron from magnetic pyrites where both occur in the same ore, consisting in subjecting the crushed material to magnetic action of such strength that, due to the difference in specific magnetic capacity of the oxide of iron and the pyrites, the oxide of iron particles will be acted upon, while the magnetic particles will not be acted upon, substantially as set forth.

"9. The process of treating ores containing magnetic oxide of iron and magnetic pyrites, consisting in first crushing the ore, then passing it through a magnetic separator of sufficient strength to separate the entire magnetic material from the nonmagnetic gangue, and then passing the concentrated ore through a magnetic separator of such strength that, due to the difference in specific magnetic capacity of the oxide of iron and the pyrites, the oxide of iron particles will be separated from the pyrites particles, substantially as set forth.

"10. The process of separating nickeliferous from non-nickeliferous pyrrhotite where both occur in the same ore, consisting in subjecting the crushed material to a magnetic action of such strength that, due to the difference in magnetic capacity of the nickeliferous and nonnickeliferous pyrrhotite, the nonnickeliferous pyrrhotite will be acted upon magnetically, while the nickeliferous pyrrhotite will not be thus acted upon, substantially as set forth.

"11. The process of treating ores containing nickeliferous and nonnickeliferous pyrrhotite, consisting in first crushing the ore to free the particles of pyrites from the gangue and other metals, passing the material through a magnetic separator of a sufficient strength to withdraw all the magnetic pyrites and then passing the magnetic pyrites through another separator having a sufficient strength to act upon the nonnickeliferous pyrrhotite, but not upon the nickeliferous pyrrhotite, substantially as set forth."

Of the foregoing, the two first claims, with unimportant

modifications, are to be found in the original application. The third claim, which the application was amended so as to embrace, adds the process of drying the ores, when necessary, after pulverization, before heating them for the purpose of the electrical separation.

The eight remaining claims purport to be copies of the claims in certain patents issued to Thomas A. Edison upon applications filed subsequent to that of Neill, and were added without further amendment of the specifications of the application.

2. Seventeen errors have been assigned in the reasons for appeal, many of which, relating to matters of practice in the Patent Office, we do not feel called upon to consider. The practice of that office is not a matter for our regulation, and irregularities therein, even if patent on the record, would only be considered when some substantial right of a party has been denied, and the point has been saved for presentation on appeal.

3. The decision of each of the three tribunals of the Patent Office has been against the applicant on the ground that there is no patentable novelty in the first two of his claims, and each has considered the remainder of the claims to involve substantial departures from the invention described and claimed in the original application, under the rule laid down in *Railway Co. v. Sayles*, 97 U. S. 554, 563, and other cases cited.

In so far as the second point of the decisions above referred to applies to those parts of claims No. 4 to No. 11, inclusive, which indicate processes of electrical concentration and separation of pyritiferous ores without a preliminary heating process at all, we think it has been correctly decided. But to concede that, in so far as they may relate to a process of heating the said ores preliminary to electrical separation, it was error to exclude them from consideration, would not substantially affect the merits of the appeal as they appear to us on the whole record.

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4. After careful examination of the specifications and claims of the patents cited as references, we are compelled to agree with the tribunals of the Patent Office, that, considered together, they constitute complete anticipation of the process claimed to have been discovered by the appellant. He of course does not claim to have discovered the process of electrical separation. It is in certain steps in connection therewith that invention is claimed. As the references aforesaid are matters of record, and have been discussed in the decisions appealed from, we shall not consume time with their review in detail. It is enough to say that in one of them at least—the patent to John R. Francis of May 23, 1873—the process of roasting—that is to say, drying the ores after pulverization and before heating, as set out in appellant's claim No. 3—is distinctly claimed.

Several references show processes for pulverizing and then heating pyritiferous ores in a furnace to a sufficient degree to drive off a part of the sulphur contained therein and render them fit for the final process of electrical separation or concentration. The contention on behalf of the appellant is, that there is a substantial difference between the processes of other patentees and his own in the fact that they introduce certain reducing agencies in the act of heating—such as charcoal, hydrocarbon gases, superheated steam, and the like—the effect of which is to convert the sulphides of iron and copper into the oxides thereof, and in support of the contention he refers to their specifications and offers a statement from his own, as amended, in comparison therewith.

After stating the details of his process of crushing and heating, and contrasting it, in point of time and fuel saved, with the processes of heating in kilns, piles, or heaps, he says:

“If heating in piles, kilns or heaps be attempted on ores containing pyrites, the reaction can not be controlled at all, and either a large part of the pyrites would remain un-

changed or it would be converted into a nonmagnetic state, as oxide, and thus the object of much heating would be frustrated. . . . By my process it is obvious that non-magnetic pyritiferous ores, of all kinds, can be more effectually and economically treated than can be done by processes involving kiln, heap or pile heating, roasting, or oxidizing of such ores."

The foregoing, and the contention which it is cited to support, are not in perfect accord, it may be remarked, with the declaration in the specifications, as filed with the original application, that—

"I am well aware it has long been known that heating iron pyrites in closed vessels, or upon charcoal, converts the same into a magnetic iron sulphide; but so far as I know it has never been proposed to separate the iron sulphide from the gangue or other material in the ore by the preliminary action of heat and the subsequent application of magnetism for purposes of concentration. I have found it not necessary to used closed vessels or charcoal in connection with the heating to convert the iron pyrites into iron sulphide, but that the iron pyrites by heating in any manner to the necessary degree and for the requisite length of time is converted into a strongly magnetic iron sulphide, and then can be separated easily and quickly and cleanly, by magnetism, from its gangue or other associated material."

Now, if the facts were in entire support of the broad contention as made, we are not prepared to say that there might not be a patentable difference between the two processes. See *In re Musgrave*, 10 App. D. C. 164, and cases cited therein. We need not, however, go further into that inquiry, because it is rendered wholly unnecessary and irrelevant by the distinct specifications, and claims of at least one of the references—namely, the English patent of Frederick John King, granted January 23, 1874. He says:

"This invention relates to effecting the separation of ores or of natural mineral substances, which, by the application

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of heat or by the application of heat together with a reducing agent, are capable of being rendered magnetic, or capable of being attracted by means of a magnet or magnets, and thereby being capable, by means of such agency, of being separated from nonmagnetic and other impurities."

And his first claim is:

"In submitting ores or other similar natural mineral products containing sulphur, such, for example, as iron pyrites or minerals containing the same, which, upon being subjected to the action of heat either in a closed or in a partially closed vessel, the sulphide of iron shall be rendered magnetic, or capable of being attracted by means of a magnet or magnets."

The second claim relates to the "higher oxides of iron" and their heating "in conjunction with a reducing agent, such, for example, as charcoal," for the purpose of the electrical separation.

5. The complaint of the appellant that patents were wrongly granted to Thomas A. Edison, and that, especially after the adoption of eight of the Edison claims by him, his application was not placed in interference with the said patents to Edison, can not be considered. Whether the grant of the Edison patents upon those claims, in whole or in part, was right or wrong, or capable of satisfactory explanation, in the light of the opposition made to the application of the appellant, or of the references aforesaid, are matters not within our jurisdiction. As a necessary preliminary to the declaration of an interference, the invention claimed must first have been declared patentable. As the decision of that question was against him, and correctly so, he is in no position, here at least, to complain that Edison has received something to which he had an earlier and better claim.

If we had a right to inquire into the propriety of the issue of the patents to Edison, and it was plain that an error had been committed therein, that would not excuse a

similar error in favor of the appellant, in order that he might be put in interference with him. There are other ways for the correction of such errors.

Finding no error in the decision of the Assistant Commissioner of Patents, the same is affirmed, and this decision will be certified to the Commissioner of Patents. It is so ordered.

*Affirmed.*

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DODGE v. FOWLER.

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PATENTS; INTERFERENCES; PRACTICE; NON-PATENTABILITY;  
LACHES; EXCUSABLE DELAY; PRIORITY.

1. Where each party to an interference attacks the invention of the other as impracticable and therefore devoid of patentable novelty, *held* that that is a question which this court can not consider in an interference proceeding. That there may be extreme cases in which it would be proper in interference proceedings to raise and determine the question of the patentability of the device in controversy may be conceded, but ordinarily no such question can arise in this court in such proceedings.
2. Where it is claimed that an alleged invention is wanting in patentability or wanting in identity with a rival applicant's device, *held* that the proper course to pursue is to move for a dissolution of the interference. The motion can not be made in this court, and except, perhaps, in very extraordinary cases no such question can properly be raised in or considered by this court. This must be regarded both as good practice and well-settled law.
3. Although F. was the first to conceive, D. was the first to reduce to practice, and as F. did not use due diligence in perfecting the invention, *held* that D. should be awarded priority.
4. Where the testimony showed that F.'s delay was occasioned only by the fact that some one to whom he had made application refused or declined at the time to construct a machine for him, *held* that if such a cause were allowed to excuse total inaction in regard to the invention and the discarding of it for the time

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for other and more immediately profitable enterprises, it is difficult to see why inaction might not be justified forever and all rival inventors effectually barred out of the field of invention.

5. Although priority of invention is awarded to D. over F., yet it is not to be understood by the decision in awarding priority to D. that he is entitled to a patent for his invention, for from the statements of the Commissioner and the Board of Examiners the inference to be drawn would seem to be that D.'s device is found to be wanting in patentability and therefore that the declaration of interference was based upon mistake or inadvertence.
6. While no motion was made by F. to dissolve the interference, yet if under the law and the rules of the Patent Office it is not improper after adjudication of priority of invention to refuse a patent to the successful party in the interference proceedings upon the grounds that have first been developed in those proceedings or upon grounds manifested at any time after the declaration of interference the court in its decision on priority is not to be understood as precluding such action by the Office.

No. 78. Patent Appeals. Submitted November 11, 1897. Decided December 8, 1897.

HEARING on an appeal from a decision of the Commissioner of Patents in an interference proceeding. *Reversed.*

The facts are sufficiently stated in the opinion.

*Mr. Philip T. Dodge* and *Mr. Robert F. Rogers* for the appellant.

*Mr. George W. Rea* and *Mr. Albert H. Norris* for the appellee.

Mr. Justice MORRIS delivered the opinion of the Court:

This is an appeal from the decision of the Commissioner of Patents in a case of interference in linotype machines for printing.

The issue in controversy is defined by the officials of the Patent Office as follows:

"The combination in an organized machine for producing type-bars from impressed lines of matrices, of a magazine having separate cells for circulating type-plates, a carrier or holder having a line-assembling channel or space,

key mechanism for individually releasing the circulating type-plates from the magazine-cells, a carrier or holder for matrix material, means for causing the line of type-plates to indent the matrix material to form a line of matrices, casting mechanism for casting a type-bar from the said matrices, and mechanism in operative connection with the line-assembling channel or space for removing the type-plates therefrom and returning them to their proper cells in the magazine."

This machine thus described is of the same general type of line-casting machines devised by Mergenthaler and others in which an impression is made upon a matrix by means of a male or cameo type, the slug or linotype being cast from such matrix. But this is claimed to be an improvement upon the Mergenthaler machine in this, that to the system of circulating the male or cameo type, adopted from the Mergenthaler machine, there is added a holder or carrier for the matrix material and means for causing the assembled line of male type to indent the matrix material and for casting a slug from such matrix, all in the same machine.

The appellee, Joseph C. Fowler, in his preliminary statement, claims to have conceived the invention in controversy in the summer of 1888; to have disclosed it to others in the same year, again in 1889, and again in April or May of 1893; to have demonstrated its practicability in 1889 by setting up ordinary type and impressing a lead plate by rolling the type into the plate; to have commenced illustrative drawings of the device in June of 1893, and the drawings for his application in August of 1893, and to have commenced the construction of a working machine in August of 1893, which he completed in November or December of the same year, and to have completed another machine for commercial use in May, 1894. This statement he amended afterward by alleging that his conception of the invention was in the summer of 1887, and that in December

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of 1891 he made drawings and commenced the construction of a machine, which he finished in February of 1892; also that his first disclosure of the invention to others was in August of 1887.

The appellant, Philip T. Dodge, in his preliminary statement says that he conceived the invention in July or August of 1890; that he communicated it to others about the same time; that he made sketches of it between that time and the first of December of the same year, and also during the summer months of the year 1891; that no working machine was ever made, and that the machine has never been in public use.

Dodge was the first to file his application for a patent, which he did on June 29, 1893. Fowler's application was filed on October 21, 1893, and his later date places upon him the burden of proof.

Voluminous testimony was taken by both parties, and upon that testimony the Examiner of Interferences adjudged priority of invention to Dodge. On appeal this decision was reversed by the Board of Examiners-in-Chief, and the decision of the Board of Examiners was sustained by the Commissioner of Patents. Appeal is now taken to this court from the decision of the Commissioner of Patents.

1. It is to be noted that each party attacks the invention of the other as impracticable, and therefore as devoid of patentable novelty; but that is a question which we can not consider here. That there may be extreme cases in which it would be proper in interference proceedings to raise and determine the question of the patentability of the device in controversy, may be conceded; but ordinarily no such question can arise in this court in such proceedings. A *prima facie* determination of the patentability of the alleged invention, and the practical identity of the devices of the rival applicants, are necessary prerequisites for a declaration of interference; and if either of these is deemed to be wanting, or is found in the course of the interference

proceedings in the Patent Office to be wanting, the proper course, as stated by the Examiner of Interferences, in his opinion rendered in this case, is to move for a dissolution of the interference. The motion can not be made in this court; and, except perhaps in very extraordinary cases, no such question can properly be raised here or considered by us. This we must regard both as good practice and well-settled law. *Hisey v. Peters*, 6 App. D. C. 68.

All the tribunals of the Patent Office find the claim of the appellee, Fowler, as the first to have conception of the invention in controversy, to be sufficiently and satisfactorily established by the proof in the case, and we concur with them in that regard. In view of their unanimity on this point, it would seem to be useless to analyze the testimony that bears upon it. It is clear to us that if Fowler had the invention at all, he had it prior to his rival. The appellant, Dodge, therefore must be regarded as the junior in conception. And it is conceded that he never reduced the invention to actual practice, and that he never in fact did anything more than make some sketches in illustration of it. But as he was the first to file his application for a patent, and is thereby entitled to the advantage of being regarded as having reduced it to constructive practice, the burden of proof is upon the contestant Fowler to show that at the time of such application, he (Fowler) was in the exercise of due diligence in the prosecution of his invention. And after all, notwithstanding the voluminous record before us, it is to this question of due diligence on the part of Fowler that the controversy between the parties appears to have been narrowed. It was upon this question that the decisions of the tribunals of the Patent Office were made to turn, and it is upon the determination of this question that our decision must be made to depend.

It does not appear that much, if anything, was done by Fowler between 1888 and December of 1892. There seems to have been desultory attempts made by him to interest

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Mr. L. G. Hine, the predecessor of Mr. Dodge in the presidency of the Mergenthaler Company, in his invention, but with no definite result. In the meantime, Fowler, who was apparently a prolific inventor, busied himself with other schemes and devices, among them a line-casting machine of the type of the Mergenthaler invention, to which he professes to regard the indenting device, here in issue, as greatly superior. But in December of 1892 he succeeded to some extent in interesting Hine in his device, and he then exhibited to him a drawing, which is claimed to show the invention, or some parts of it, in an improved shape; and it is claimed that other drawings were made in the course of the first half of the year 1893. But the only testimony to these is that of Fowler himself. Hine, however, again put him off, and urged him to finish certain other work for another company in which they seem both to have been interested. At last, in August of 1893, Fowler returned to his indenting-machine and to his solicitation of Hine, and told the latter that if he (Hine) would not build it, some one else would be procured to do so. Fowler then succeeded in some way in procuring a machine to be constructed which embodied his device, and afterward, on account of some structural weakness in this first construction, he had a second one made, which is alleged to have worked successfully. All this activity, however, was after Dodge had entered the field of invention and had actually filed in the Patent Office the application from which the present proceedings have resulted.

To Dodge must be assigned the second conception, but priority in reduction to practice, since under the law and the authorities he is entitled by his application, treated as an allowable application, to the benefit of a constructive reduction to practice. It is true that it is held by the Commissioner of Patents, that he is not entitled to the benefit of such reduction to practice, because it has been shown that his device, or a machine constructed according to his

device, is inoperative. But, as we have already intimated, that raises a question which we can not consider here. We must regard him as having constructively reduced the invention to practice before Fowler filed his application in the Patent office.

Now this constructive reduction to practice is entitled to the date of June 29, 1893, the date of the filing of the application; and we fail to find in the record any sufficient evidence whatever that Fowler did anything in the way of a reduction to practice before August, 1893. We can not assume that his solicitation of Hine, in December of 1892, was any such manifestation of activity and due diligence as the law requires; and his production at that time of a new sketch, which, according to his own claim, was no more than a mere variation of his original conception in 1887, can not be regarded as evidence of diligence. Even if this second sketch should be regarded as proof of a new or second conception at that time, it was not followed up in such a way as to cut out another inventor who appeared in the field soon afterward, and promptly followed up his conception of the invention with an application for a patent. In fact, it was not followed up at all but practically discarded for another pursuit. Assuming that he made other sketches in the meantime, which can not be taken as proved, mere persistence in the making of sketches, when the device or invention has already been sufficiently illustrated in sketches and sufficiently explained to other persons, can not be regarded as diligent prosecution of an invention.

It is claimed that Fowler is or was a comparatively poor man; that the machines required to be constructed were costly; and that he had to rely upon his interesting others in his device to procure its actual reduction to practice. But apart from the fact that there is no good reason shown why he could not have done, at any time prior to August of 1893, what he proceeded to accomplish at that time, the plain answer to this contention is, that he could have done at any

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time what Dodge did—that is, he could have filed his application in the Patent Office, and thereby fully protected himself. In failing to do so, he took upon himself the risk that other inventors might enter the field and gain an advantage over him by greater diligence.

It is true that in the case of *Yates v. Huson*, 8 App. D. C. 93, this court said that “the law tolerates at least, if it does not encourage, delay on the part of inventors, in order that they may perfect their inventions and obtain reasonable evidence of their merits;” and it discouraged the practice of crowding the Patent Office with hasty, crude, and incomplete devices. But there is no claim here on the part of Fowler that his invention was incomplete, or that his delay was occasioned by any desire or purpose to perfect it. According to his own testimony, the delay was occasioned only by the fact that some one to whom he had made application refused or declined at the time to construct a machine for him. But if such a cause were allowed to excuse total inaction in regard to the invention, and the discarding of it for the time for other and more immediately profitably enterprises, it is difficult to see why inaction might not be justified forever, and all rival inventors effectually barred out of the field of invention.

Assuming, therefore, that Fowler had the invention in question in 1887 or 1888; that he then made sketches of it and communicated it to others, but that he did nothing further with it before August of 1893, beyond the making of some additional sketches and repeated solicitations to another person to construct a machine for him, which, however, do not seem to have amounted to more than mere solicitation; and assuming also, which we must assume for the present purpose, that Dodge conceived substantially the same invention in 1890 or 1891, or even in the early part of 1893, and that in June of 1893 he followed up his conception with an application in due form for a patent, accompanied by appropriate sketches and drawings, upon which

his application was adjudged to be an allowable one, and his device to be a patentable invention constructively then reduced to practice by him, we can not hold that there was due diligence on the part of Fowler which would preclude Dodge from having the benefit of the earlier application.

Entertaining this view of the question of due diligence as presented to us in this case, we feel constrained to reverse the decision of the Commissioner of Patents, and to award priority of invention to the appellant, Philip T. Dodge.

But there is a consideration in the case which we can not ignore, although we have specifically excluded it from any influence in our determination of the question of due diligence, which we have regarded as the only question before us in this interference. The Commissioner of Patents, in his opinion, says that "the specification and drawings in the application of Dodge are insufficient to enable one skilled in the art, without other aids, to construct an operative line-casting machine of the indenting type called for by this issue."

And the board of examiners expressed the same idea even more positively. They said: "These objections are apparently valid, and create a serious doubt whether it would not require much experiment, if not invention, to complete and perfect the Dodge machine."

We do not desire it to be understood by our decision that Dodge is entitled to a patent for his alleged invention. What we decide is simply that, assuming that Fowler and Dodge have made the same invention independently of each other, and that Dodge has been the first to reduce it to constructive practice by his first application for a patent, we think the question of due diligence should be settled in his favor as against Fowler. From the statements of the Commissioner and the board of examiners, the inference to be drawn would seem to be that Dodge's device is found to be wanting in patentability, and therefore that the declaration

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of interference was based upon mistake or inadvertence. It is true that no motion was made on behalf of Fowler to dissolve the interference; but if, under the law and the rules of the Patent Office, it is not improper, after adjudication of priority of invention, to refuse a patent to the successful party in the interference proceedings upon grounds that have first been developed in those proceedings, or upon grounds manifested at any time after the declaration of interference, we are not to be understood by this decision as precluding such action by the Office.

*This opinion and the proceedings in the cause will be certified by the clerk to the Commissioner of Patents, according to law.*



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**ABATEMENT, PLEAS IN.** See **PLEADING AND PRACTICE**, 12.

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**ACCOUNTING.** See **EQUITY**, 6; **STATUTE OF LIMITATIONS**, 3.

1. Where cross demands or mutual accounts or dealings exist between parties, and one gives to the other a note or security for the payment of a definite amount growing out of the transactions, or some of them, the presumption arises that the amount for which the note or security is given is the balance due the party to whom it is given upon a statement or settlement of the mutual accounts existing between them at the time, including all the items and demands which each then had against the other; and the burden is upon the party controverting such presumption to prove by clear and satisfactory evidence, not only that some items were omitted from such accounting, but also that they were omitted by the mutual mistake of both parties or the fraud of the party to whom the note or security is given. *Marmion v. McClellan*, 467.
2. Where an auditor's report charges a given sum against one of the parties with interest from a certain date, an exception to the allowance of the sum awarded raises the question as to whether the interest was allowed from the proper date. *Id.*
3. Where in a proceeding in equity for an accounting it is determined that such a relation of confidence existed between the complainant's decedent and the defendant that a profit made by the defendant on a purchase of property from the decedent during her life time belongs to her estate, the defendant may properly be relieved of paying interest prior to the decree requiring him to account for such profit. *Id.*

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1. On an appeal the court can not consider the question of the preponderance of evidence. *Brown v. RR. Co.*, 37.
2. Where the lower court extends its term thirty days from the entry of an appeal within which to settle bills of exception, but fails to settle them until more than two months elapse, at which time thirty days additional are given the appellant to file the transcript of the record in this court, the appeal will be dismissed here for violation of Rule XIV, which provides that the transcript must be filed in this court within forty days from the time of the appeal entered and perfected in the court below. *D. C. v. Humphries*, 68.
3. Where a transcript of the record on an appeal from a judgment on a verdict rendered in the absence of a juror, is filed in this court after the forty days prescribed by the rule, on a motion to dismiss the appeal the judgment will not be declared to be an absolute nullity, but the appeal will be dismissed, and the appellant left to his remedy, if he has one, by motion under Section 6, of the Maryland Act, 1789, Chapter 9, providing for setting aside judgments founded in irregularity in obtaining the same. *Id.*
4. A rule of this court is the law of the court, as it is of the parties, and there is no dispensing power in the court to meet what is supposed to be the pressing exigency of a particular case. *Id.*
5. The allowance or refusal of an injunction *pendente lite* is largely within the discretion of the trial court, and its orders will not on appeal be disturbed unless manifestly erroneous, *following*

Electric Lighting Co. v. Metropolitan Club, 6 App. D. C. 536.  
Oil Co. v. Oeser, 80.

6. Where after an appeal in a personal injury case from a judgment for the defendant on a verdict directed by the court at the close of the plaintiff's testimony, on which appeal the judgment is reversed on the ground that a *prima facie* case of negligence on the part of the defendant had been made out, a second trial is had upon the same evidence for the plaintiff and evidence adduced by the defendant of a contradictory character, and also alleged to show contributory negligence, a judgment on a verdict for the plaintiff will not be disturbed on an appeal by the defendant. RR. Co. v. Adams, 396.
7. A citation must be issued within five days after an appeal is taken under the rules of this court, and a failure to do so will subject an appellant to the dismissal of his appeal, unless there has been a waiver by the appellee, or the appeal has been taken in open court at the term at which the decree appealed from was rendered. Chester v. Morgan, 435.
8. An order denying a petition for a rehearing and incidentally for leave to amend a bill of complaint, is not appealable. Id.
9. A judgment on verdict in an action of assumpsit *modified* upon condition of the entry in this and the lower court of a *remit-titur* of a portion of the judgment, the portion held to be erroneous being readily separable from the balance. Ross v. Fickling, 442.
10. The allowance or refusal of a motion to strike out testimony which has been admitted without objection, is usually a matter of discretion with the trial court, which can not be reviewed on appeal; and it is only where the objection could not have been taken more seasonably that an exception is made to this rule. De Forest v. U. S., 458.
11. When objection is made to the introduction of testimony the specific ground of objection should be stated, so that it may appear upon the record, and also that the other party may have an opportunity to obviate it. Id.
12. The exclusion of testimony can not properly be assigned as error when the record fails to show any specific offer of proof was made. Id.
13. An assignment of error can not be sustained when based upon an exception taken to a larger part of a charge to the jury in bulk, which part contains several plainly unexceptional propositions of law. Id.
14. If the trial court mistakes or misconstrues a decree of this court, and does not give full effect to the mandate, its action may be controlled either upon a new appeal or by a writ of *mandamus* to execute the mandate of this court. Ex parte Mansfield, 558.

ASSIGNMENTS. See EQUITY, 1, 2; FRAUDULENT CONVEYANCES, 6, 7.

1. An assignment by a debtor to a creditor of a fund due him under

a contract with the District of Columbia for the erection of school buildings, with directions to the assignee, after paying his own claim, to distribute the residue among certain other creditors, passes the legal title to the fund and creates a trust for the creditors named, although at the time some of them had no knowledge of the transaction and did not assent thereto. *Smith v. Herrell*, 425.

2. In such case, the presumption of law is, in the absence of all evidence to the contrary, that the parties accepted the benefit of the assignment. *Id.*
3. And in such case, the residue of the fund in the hands of the assignee is not subject to attachment by other creditors of the assignor, especially where such residue was not sufficient to discharge the claims of creditors named in the assignment who were present and agreeing to the disposition, and who in order to effect it withdrew their claims previously filed under a regulation of the District, thus making the assignment to stand upon a valuable consideration as to them. *Id.*

**ASSIGNMENTS FOR BENEFIT OF CREDITORS.** See **ASSIGNMENTS**; **FRAUDULENT CONVEYANCES**, 6, 7.

**ASSIGNMENTS OF ERROR.** See **APPELLATE PRACTICE**, 13.

**ASSUMPSIT.** See **PLEADING AND PRACTICE**, 19.

#### **ATTACHMENT.**

1. A garnishee in default in answering interrogatories served upon him with a writ of attachment or garnishment, may answer the interrogatories at any time before proceedings are had upon his default, and leave of court is not necessary to enable him to do so; especially where the writ is in aid of the execution of a decree in equity. *Banville v. Sullivan*, 23.
2. One who claims a lien upon attached property has the same right to intervene in the attachment proceedings as one who claims title to the property. *Daniels v. Solomon*, 163.
3. A petition of intervention by judgment creditors in attachment proceedings which fails to allege that the defendants in attachment have no other property than that attached upon which the intervenors may levy execution is demurrable, but the defect is not a jurisdictional one, and may be cured by verdict and judgment. *Id.*
4. The issue of a writ of execution on a judgment of a justice of the peace and a notice of that fact by the constable having the writ to the marshal who holds property of the judgment debtor under an attachment, is the equivalent of an actual levy by the constable, and will authorize the judgment creditors to intervene in the attachment proceedings. *Id.*
5. Under the attachment law of the District, when the defendant's affidavit traverses the plaintiff's affidavit, upon which the writ was issued by the clerk, the burden of proof is upon the plain-

tiff to prove the facts alleged by him ; and where judgment creditors of the defendants in attachment intervene in the proceeding, they become virtually defendants therein, with the right to traverse the affidavit in support of the attachment. *Id.*

6. But where such intervenors charge collusion between the plaintiff and defendants in attachment for the purpose of allowing the plaintiff to obtain unlawful preference over the intervenors and other creditors of the defendants, the burden of proof is upon the intervenors to prove such charge. *Id.*

**ATTORNEY AND CLIENT.** See **PATENTS**, 24.

The knowledge of an attorney, whether communicated to his clients or not, in a given case, *held* to bind his clients. *Patten v. Warner*, 149.

**AUDITOR'S REPORT, EXCEPTIONS TO.** See **ACCOUNTING**, 2.

**AUTHENTICATION OF DOCUMENTS.** See **EVIDENCE**, 6.

**BAWDY HOUSES.** See **CRIMINAL LAW**, 6-10.

**BEQUESTS.** See **WILLS**.

**BILL OF PARTICULARS.** See **CRIMINAL LAW**, 2, 3, 4 ; **JUSTICES OF THE PEACE**, 4, 5.

**BILLS AND NOTES.** See **PROMISSORY NOTES**.

**BILLS OF EXCEPTIONS, SETTLEMENT OF.** See **APPELLATE PRACTICE**, 1.

**BONDS.** See **DEEDS OF TRUST**, 1.

A bond voluntarily executed to the United States conditioned upon the faithful performance of a contract with a number of tribal Indians, whereby the Indians were temporarily employed by the obligors, who contracted among other things to pay them monthly salaries, to provide them with proper food and raiment, and to return them to the Government agency within a specified time without expense to the United States, is a valid and binding obligation, although not authorized by statute ; and for breaches of its conditions the United States can recover not only for the expense the Government may have incurred in returning the Indians to the agency, but for the amount due the Indians for nonperformance of the contract, as the seal of the instrument imports a consideration, and an action thereon could not be maintained at law except in the name of the obligees. *U. S. v. Humphrey*, 44.

**BROKERS.** See **REAL ESTATE AGENTS**.

**BURDEN OF PROOF.** See **ACCOUNTING**, 1 ; **ATTACHMENT**, 5, 6 ; **FRAUDULENT CONVEYANCES**, 4 ; **UNDUE INFLUENCE**, 2 ; **WILLS**.

**BY-LAWS.** See **SOCIAL CLUBS**, 2.

**CARRIERS.** See **RAILROADS**.

**CERTIORARI.** See JUSTICES OF THE PEACE, 1, 3, 5, 6; UNITED STATES COMMISSIONERS, 1, 4.

In order to review or quash the proceedings of an inferior tribunal on *certiorari*, the inferior tribunal must have proceeded in the cause without jurisdiction, or its procedure must have been clearly illegal, or unknown to the law, or so essentially irregular as to be contrary to right and justice; and the writ of *certiorari* can not be made to serve the purposes of a writ of error, or an appeal with bill of exception. *Bradshaw v. Earnshaw*, 495.

**CHARGE TO JURY, EXCEPTIONS TO.** See APPELLATE PRACTICE, 13.

**CHARTER.** See RAILROADS, 4.

**CHILDREN, CUSTODY OF.** See DIVORCE, 2-5.

**CITATION ON APPEAL.** See APPELLATE PRACTICE, 7.

**CLUBS.** See SOCIAL CLUBS.

**COLLATERAL ATTACK, EVIDENCE IN.** See PLEADING AND PRACTICE, 15.

**COMITY.** See RAILROADS, 4.

**COMMISSIONER OF PATENTS.** See PATENTS.

**COMMISSIONERS.** See UNITED STATES COMMISSIONERS.

**COMMISSIONS.** See REAL ESTATE AGENTS.

**COMMON CARRIERS.** See RAILROADS.

**COMMON LAW OFFENCES.** See CRIMINAL LAW, 9, 10.

**COMMON SOURCE OF TITLE.** See EJECTMENT, 2.

**CONFESSION AND AVOIDANCE.** See EQUITY PLEADING AND PRACTICE, 1.

**CONNECTING CARRIERS.** See RAILROADS, 1, 2.

**CONSIDERATION.** See ASSIGNMENTS, 3; BONDS; FRAUDULENT CONVEYANCES, 1, 2; TRUSTS, 7; WILLS.

**CONSIDERATION, RETURN OF.** See RELEASE, 1, 2.

**CONSTITUTIONAL LAW.** See JUSTICES OF THE PEACE, 1, 2; POLICE COURT; POLICE POWERS.

**CONSTRUCTION OF DEEDS.** See JOINT TENANCY, 1-5.

**CONSTRUCTIVE FRAUD.** See TRUSTS, 14.

**CONSTRUCTIVE NOTICE.** See NOTICE.

**CONTRACTS.** See ACCOUNTING; ATTORNEY AND CLIENT; EQUITY, 1, 2, 5; HUSBAND AND WIFE, 1, 2; LIFE INSURANCE; RAILROADS, 1, 2; REAL ESTATE AGENTS; RELEASE, 1.

To create a binding contract the minds of the parties must meet in a contractual relation. *Patten v. Warner*, 149.

**CONTRIBUTORY NEGLIGENCE.** See NEGLIGENCE; STREET RAILWAYS, 1, 4.

CONVICTS, DISCHARGE OF POOR. See POOR CONVICTS;  
UNITED STATES COMMISSIONERS, 3, 4.

**COPYRIGHT.**

1. Where the proprietor of a manuscript translation of a play licenses a theatre manager to use the translation for a specific purpose, the license can not confer upon a printer and publisher of the play the power to copyright it, and a copyright so attempted to be taken out is invalid. *Koppel v. Downing*, 93.
2. Nor can the proprietor of the manuscript, in such a case, in a suit brought by the printer and publisher against one whom he claims to be infringing his alleged copyright, by adoption constitute the plaintiff a trustee for himself upon an agreement to share the recovery with him. The policy of the law is against such disguises, and they will not be encouraged by the courts. *Id.*
3. Where the owner of a manuscript, after filing with the Librarian of Congress copies of the title page, neglects to perfect his copyright by filing copies of the published work as required by law, and by such neglect abandons his right, that right can not, sixteen years afterwards, be revived by authorizing somebody else to apply for and obtain a copyright in a name different from that of the real proprietor. *Id.*

CORPORATIONS. See FOREIGN CORPORATIONS; RAILROADS, 3, 4;  
SOCIAL CLUBS.

CORPORATIONS, SERVICE OF PROCESS UPON. See FOREIGN  
CORPORATIONS; PLEADING AND PRACTICE, 16, 17.

COSTS. See PLEADING AND PRACTICE, 25.

COSTS ON APPEAL. See PATENTS, 4.

COURTS. See POLICE COURT.

CREDITORS, ASSIGNMENTS FOR BENEFIT OF. See ASSIGN-  
MENTS; FRAUDULENT CONVEYANCES, 6, 7.

CREDITORS' SUITS. See FRAUDULENT CONVEYANCES.

CRIMINAL LAW. See POOR CONVICTS; UNITED STATES COM-  
MISSIONERS, 3, 4.

1. The possession by a person in the District of a partridge or quail during the close season prescribed by the act of Congress of June 15, 1878 (20 Stat. 134), is a violation of that act, whether such bird was taken or killed beyond the limits of the District or not. *Javins v. U. S.*, 345.
2. In prosecutions for selling liquor without a license, the prosecution may on motion of the accused be required to file a bill of particulars of the times, places and circumstances of the offence; but the granting of such a motion is within the sound judicial discretion of the trial court. *Lauer v. D. C.*, 453.
3. Whether in a given case wherein such discretion is palpably abused so as to work manifest injustice, the action of the trial court is reviewable on appeal, *quære*. *Id.*

4. When in such a case the guilt of the accused is not made to turn upon a single act of sale to any one person, but upon a course of conduct tending to show he was a common seller of liquor during the period charged in the information, the refusal of the trial court to require a bill of particulars is not error. *Id.*
5. Under the act of Congress of March 3, 1893 (27 Stat. 567), the furnishing by a boarding house keeper to his boarders and customers of beer with their meals and lunches, and without its being specially called or contracted for, is a sale thereof, which if made without a license is punishable. *Id.*
6. The mere keeping of a bawdy house, where others and not the keeper commit acts of immorality, is of itself a disorderly act; and a person may be guilty of a criminal offence in so doing whose conduct may be otherwise unobjectionable or even irreproachable. *De Forest v. U. S.*, 458.
7. In a prosecution for keeping a bawdy house, it is not necessary for the Government to prove the business is conducted openly and notoriously, but it is sufficient if it be shown that the house is commonly resorted to for the commission of acts of immorality and that the proprietor knows the fact and either procures it to be done, connives at it, or does not prevent it. *Id.*
8. In such a prosecution, a statement in the trial court's charge to the jury that every person is presumed to have knowledge of that which goes on in his own house, and that if it should be shown that persons continuously resort to such house for immoral purposes, the proprietor of the house would be held responsible for keeping an immoral house, is not erroneous. While the presumption of innocence continues until guilt is shown, guilt may be shown circumstantially as well as directly, and when circumstances of guilt are shown the presumption of guilt displaces the presumption of innocence. *Id.*
9. The common law of England in all its branches both civil and criminal remains to-day the law of the District of Columbia, except where it has been repealed by express statutory enactment, or modified by inconsistent legislation, or where it has become obsolete or unsuited to our republican form of government. *Id.*
10. The keeping of a bawdy house was a common law offence and is punishable as such in this District. *Id.*

CROSS-BILL. See DIVORCE, 1, 2.

DAMAGES. See RELEASE, 1.

DECLARATIONS. See TRUSTS, 6.

DECLARATIONS AS EVIDENCE. See EVIDENCE, 2, 5; PLEADING AND PRACTICE, 10; UNDUE INFLUENCE, 3.

DECREE. See FOREIGN CORPORATIONS.

DECREE AS EVIDENCE. See PLEADING AND PRACTICE, 15.

DEEDS. See EVIDENCE, 1; FRAUDULENT CONVEYANCES; UNDUE

INFLUENCE; DEEDS, CONSTRUCTION OF; See JOINT TENANCY, 1-5.

DEEDS OF TRUST. See EQUITY, 3, 4; HUSBAND AND WIFE, 1.

1. Where a debtor gives a deed of trust to secure the payment of a bond executed to his creditor, and the bond is subsequently reduced to judgment, the bond is not so merged in the judgment as to preclude the creditor from enforcing the deed of trust in equity. *Sis v. Boarman*, 116.
2. Neither the beneficiary nor the trustee under a deed of trust can maintain a bill for partition of the property covered by the deed of trust; but the purchaser at a sale thereunder may do so. *Id.*

DEEDS, RECITALS IN. See TRUSTS, 7.

DEEDS, RECORDATION OF. See NOTICE.

DEFAULT, JUDGMENT BY. See PLEADING AND PRACTICE, 18.

DISMISSAL OF APPEAL. See APPELLATE PRACTICE, 3.

DISTRICT OF COLUMBIA. See STATUTE OF LIMITATIONS, 1; STREETS AND HIGHWAYS, 1, 3.

DIVORCE. See PLEADING AND PRACTICE, 15.

1. In a suit for a divorce, where a cross-bill is answered, it may be retained and made the basis of a decree although the original bill is dismissed. *Wells v. Wells*, 392.
2. And in such a case, although the cross-bill contains no prayer for the disposition of a child of the parties, a prayer to that effect contained in the original bill and repeated in the answer to the cross-bill, is sufficient, under Sec. 747, R. S. D. C., relating to the custody and maintenance of the child. *Id.*
3. The power of a court of equity in divorce proceedings in respect of children of the parties, is incidental only to the principal subject-matter of the controversy; and no special allegation in the pleadings in relation to the children is required in order to justify the court to provide for their maintenance and support. *Id.*
4. In such proceedings, in determining to which of the parties the custody of a child will be awarded, the best interest of the child will be considered as paramount. *Id.*
5. The matter of the award of the custody of a child or children, in such cases, is one almost exclusively of judicial discretion, which will never be reviewed on appeal except when manifestly abused. *Id.*

DOCUMENTARY EVIDENCE. See EVIDENCE, 6.

DOCUMENTS, AUTHENTICATION OF. See EVIDENCE, 6.

DOWER.

An inchoate right of dower in a wife can not be broader than the estate of her husband upon which it depends. *Sis v. Boarman*, 116.

**EJECTMENT.** See ORPHANS' COURT.

1. The striking out of the name of one of several plaintiffs in ejectment is an amendment within the meaning of R. S. U. S., Sec. 956, and being within the discretion of the trial court is not appealable. *Morris v. Wheat*, 201.
2. Where in ejectment all parties claim under a common source of title, the defendant is estopped to deny the validity of that title. *Id.*
3. During the existence of the tenancy, neither a lessee nor his assigns can dispute the title of the lessor or his heirs, either by setting up title in themselves or in a third person. *Id.*
4. In order to convert a tenancy into adverse possession there must be a clear, positive and continued disclaimer and disavowal by the tenant of his landlord's title, and assertion of an adverse right brought home to the landlord. *Id.*
5. One tenant in common may oust his co-tenants and claim title to the whole adversely, but notice of his adverse claim must be brought home to his co-tenants in order to bind them. *Id.*
6. The amendment of a declaration in ejectment by striking out the name of one of the several original plaintiffs, where the amendment asserts the same title and the same recovery, is not equivalent to the commencement of a new suit, so as to restrict the recovery of *mesne* profits for a period of three years before the filing of the amended declaration. *Id.*

**EQUITABLE ASSIGNMENT.** See EQUITY, 1.**EQUITY.** See ACCOUNTING, 1, 3; DIVORCE, 3, 4, 5; NUISANCES; TRUSTS; WILLS.

1. An offer or promise by the purchaser of real estate to assign to the vendor so much of a claim belonging to him as would amount to double the balance of the purchase money due when accepted by her, which offer he alleges she accepted, will constitute an equitable assignment of that portion of the claim, without regard to the form of the words or whether the promise to assign was in writing, as equity will regard that as done which ought to be done, and will give effect to it. *Dexter v. Gordon*, 60.
2. And where such a purchaser defeats a suit by the vendor for the balance of the purchase money, on the ground of her acceptance of his offer to assign a portion of the claim held by him, he is estopped to assert there was no assignment of his interest in the claim when she subsequently accepts such offer in a suit to establish her rights to a fund realized from the payment of the claim. *Id.*
3. The enforcement in equity of mortgages and deeds of trusts of real estate, is governed by the statute of limitations applicable to possessory actions at common law for the recovery of real estate, which statute in this District is that of 21 James I, Ch.

- 16, prescribing twenty years within which such actions must be instituted. *Sis v. Boarman*, 116.
4. Because a deed of trust creditor has permitted nineteen years and five months of such term of twenty years to elapse without attempting to enforce his deed of trust, he will not for that reason alone be held guilty of laches, and to be barred from the prosecution of his suit to enforce. Some special ground must be shown to justify the application of the doctrine if laches in cases to which the statute of limitations is directly applicable. *Id.*
  5. The fact that an indebtedness is contracted for the purchase and consumption of intoxicating liquors, does not, in this District, constitute ground for a court of equity to refuse its aid in enforcing it. *Id.*
  6. The statute of limitations is equally a bar in equity as at common law in a case where there is concurrent jurisdiction, as in a suit for an accounting; *following Sis v. Boarman, ante*, p. 116. *Patten v. Warner*, 149.

**EQUITY PLEADING AND PRACTICE.** See APPELLATE PRACTICE, 5; ATTACHMENT, 1; DIVORCE, 1, 2; TRUSTS, 9.

1. Allegations of an answer to a bill in equity which are not directly responsive to the charges in the bill, but raise an independent defence in the nature of confession and avoidance, and which are put in issue by the replication, are not themselves evidence but must be proved. *Dexter v. Gordon*, 60.
2. Where such an allegation in an answer so put in issue by the replication sets up an estoppel in bar by reason of a decree which is made an exhibit to the answer, but the decree is not proved or offered in evidence, such decree can not properly be considered in evidence. *Id.*
3. A bill for the specific performance of an agreement to convey real estate in consideration of the performance of professional services considered, and an order sustaining a demurrer to it *affirmed*, upon the ground that the bill was too vague, indefinite and insufficient to justify the divesting of vested rights, but *modified* upon the equity manifested, so as to dismiss the bill without prejudice to complainant to institute another suit, if so advised. *Chester v. Morgan*, 435.
4. New and affirmative matter set up in an answer to a bill in equity and not responsive to the allegations of the bill, is not evidence in favor of the defendant. *Marmion v. McClellan*, 467.
5. An order in an equity cause finally determining a collateral matter growing out of an incident to the execution of the original decree in the cause, can not be set aside, vacated or modified by the court on motion or petition filed after the expiration of the term at which the order is made, but is conclusive until reversed on appeal or set aside on a bill of review. *Schwartz v. Costello*, 553.

**ESTOPPEL.** See EJECTMENT, 2; EQUITY PLEADING AND PRACTICE, 2; PLEADING AND PRACTICE, 15.

**EVIDENCE.** See APPELLATE PRACTICE, 1; ATTACHMENT, 5, 6; EQUITY PLEADING AND PRACTICE, 1, 2; FRAUDULENT CONVEYANCES, 1; HUSBAND AND WIFE, 8; JOINT TENANCY, 2; ORPHANS' COURT; PLEADING AND PRACTICE, 10, 15; REAL ESTATE AGENTS, 1; TRUSTS, 3, 6, 7; UNDUE INFLUENCE, 2, 3.

1. Where any important provision has been omitted from a deed, whether intentionally by the parties, or through mistake of the law as to the necessity of incorporating it in the deed, or through carelessness or inattention at the time of executing the instrument, and no fraud is charged or proved against the grantee in the deed, who denies the existence of any such provision as that alleged to have been omitted, parol evidence is not admissible to add to or vary the terms of the instrument. *McCartney v. Fletcher*, 1.
2. The tendency is to extend and liberalize the principle of admission of declarations as part of the *res gestæ*. *RR. Co. v. McLane*, 220.
3. The declaration of a boy fourteen years of age mortally injured in a street railway accident, made while lying between the tracks from 5 to 10 minutes after the occurrence, as to the cause of his injury in response to a question of his mother, is admissible as part of the *res gestæ* in a suit by his administrator, especially where the truth of the declaration is to a certain extent corroborated. *Id.*
4. In such a case, similar declarations made by the deceased while in an ambulance on his way to a hospital in answer to questions addressed to him by the officer in charge of the ambulance, are inadmissible. *Id.*
5. But in such a case if such declarations to the officer were substantially but repetitions of the statement made at the place of the injury, their admission in evidence, though erroneous, is not reversible error, the error not being prejudicial. *Id.*
6. The method of authentication of documents prescribed by the act of Congress of 1890, is not exclusive of any other which the States may adopt; so that a document offered in evidence in a suit in this District, insufficiently authenticated under that act of Congress, will be admissible if properly authenticated under the Maryland act of Assembly of 1785, Ch. 46, Secs. 1 and 2, in force here. *Droop v. Ridenour*, 224.
7. The general passenger agent of a railroad at the time a lost ticket was printed, may testify as to its contents, although he never saw it, from his recollection of the forms of tickets then in use, all of which had been prepared under his direction. *Howard v. Rwy. Co.*, 300.
8. And such a witness in testifying to the contents of a certain excursion ticket, may refer to a single trip ticket to refresh his

memory, where he testifies they were identical except as to one condition which related to the return coupon. *Id.*

9. A defendant in equity who claims credit for sums alleged to be due him from a complainant executor, for medical services and board furnished the decedent, is an incompetent witness under Sec. 858, R. S. U. S., as it involves his testifying as to transactions with and statements of a decedent. *Marmion v. McClellan*, 467.

EVIDENCE, ANSWER AS. See EQUITY PLEADING AND PRACTICE, 1, 4; TRUSTS, 9.

EXCEPTIONS. See APPELLATE PRACTICE, 13.

EXCEPTIONS TO AUDITOR'S REPORT. See ACCOUNTING, 2.

EXECUTION. See ATTACHMENT, 1, 3, 4.

EXHIBITS TO ANSWER AS EVIDENCE. See EQUITY PLEADING AND PRACTICE, 2.

FIDUCIARY RELATIONS. See TRUSTS, 13, 14.

FINAL ORDER. See EQUITY PLEADING AND PRACTICE, 5.

FINES, NONPAYMENT OF. See POOR CONVICTS; UNITED STATES COMMISSIONERS, 3.

FOREIGN CORPORATIONS. See RAILROADS, 3, 4.

The decree of a court of another jurisdiction appointing receivers of a corporation doing business in this District, does not operate as a transfer of the property of the corporation situated here or a discontinuance of its resident office, and service of process upon its local agent is valid when he continues in charge of the office, although after the appointment of the receiver he may be employed by the receiver. *Howard v. Rwy. Co.*, 300.

FOREIGN CORPORATIONS, SERVICE OF PROCESS UPON. See FOREIGN CORPORATIONS; PLEADING AND PRACTICE, 16, 17.

FRAUD. See ACCOUNTING, 1; ATTACHMENT, 6; EVIDENCE, 1; FRAUDULENT CONVEYANCES; RELEASE, 1; TRUSTS, 12, 14; UNDUE INFLUENCE.

FRAUDULENT CONVEYANCES. See EVIDENCE, 1.

1. It is competent for the grantee in a deed attacked for fraud to show by parol that the true consideration for the conveyance was greater than that recited, the only requirement being that the true or superadded consideration must be of the same nature and kind as that stated in the deed and not inconsistent with it. *Droop v. Ridenour*, 224.
2. The surrender of a claim for alimony due, or to become due, under a decree of court, constitutes a valuable consideration as against the creditors of a party bound to pay such alimony. *Id.*

3. The existence of the relation of husband and wife between the grantor and grantee in a deed does not of itself create a *prima facie* presumption of fraud against creditors. *Id.*
4. When a deed is attacked by creditors as fraudulent and collusive and the charge includes one of embezzlement against the grantor, the complainants must sustain the burden of proof which is upon them by clear and indubitable proof, and not upon presumptions and suspicions. *Id.*
5. In such a case, the conveyance, if for a valuable and adequate consideration, will be upheld as against the grantor's creditors, however fraudulent his purpose in making it was, if the grantee had no knowledge of such purpose. *Id.*
6. While an absolute conveyance of property by a debtor directly to one of his creditors in payment and discharge of a pre-existing debt or liability, may have the effect of giving a preference to such creditor, it is not an assignment for the benefit of creditors within the meaning of the act of Congress of February 24, 1893, declaring void all preferences of one creditor over another in voluntary assignments for the benefit of creditors. *Id.*
7. Where creditors attack a deed of their debtor to a third person as fraudulent, they can not in same suit, upon the failure of the proof to sustain the charge of fraud, successfully contend that it was, as an assignment for the benefit of creditors, void as making a preference. *Id.*

GAME LAW. See CRIMINAL LAW, 1.

GARNISHMENT. See ATTACHMENT.

GENERAL ISSUE, PLEA OF THE. See PLEADING AND PRACTICE, 18.

GENERAL TERM, SUPREME COURT, D. C., DECISIONS OF.  
See PLEADING AND PRACTICE, 4.

GIFT. See TRUSTS, 2; UNDUE INFLUENCE, 1-4.

GIFT ENTERPRISES.

An enterprise by which a trading stamp company distributes among merchant subscribers so-called trading stamps for distribution to customers according to the amounts of their purchases, which stamps when collected in sufficient numbers entitle the holders to premiums supplied by the company, is within the meaning of the act of Congress of February 17, 1873 (R. S. D. C., Secs. 1176 and 1177), prohibiting gift enterprises in the District of Columbia. *Lansburgh v. D. C.*, 512.

HIGHWAYS. See SEVENTH STREET ROAD; STATUTE OF LIMITATIONS, 1, 2; STREETS AND HIGHWAYS.

HUSBAND AND WIFE. See DIVORCE: DOWER; FRAUDULENT CONVEYANCES, 2, 3; TRUSTS.

1. Where a married woman purchases real estate and gives as part

payment of the purchase money the promissory notes of herself and husband secured by deed of trust upon the property, the notes have relation to her sole and separate estate within the meaning of R. S. D. C., Sec. 727, and a suit is maintainable thereon against her under R. S. D. C., Sec. 728, giving a married woman power to contract, sue, and be sued in her own name in all matters having relation to her sole and separate property, as if unmarried. *Sonneman v. Loeb*, 143.

2. Whether a distinction between the executed and executory contracts of a married woman can properly apply in any case arising under the Married Woman's Act in force in this District, *quære*. *Id.*
3. In the absence of proof as to the property rights of a married woman in other States, it will be presumed by the courts of this District that the rule of the common law or that in force here with respect of these rights, prevails in such other States. *Howard v. Rwy. Co.*, 300.
4. A right of action to recover damages for personal injuries to a married woman is not in this District her separate statutory property, and can not be discharged by her separate release. *Id.*

ILLEGAL CONTRACTS. See EQUITY, 5.

INCHOATE RIGHT OF DOWER. See DOWER.

INCORPORATION. See RAILROADS, 4; SOCIAL CLUBS.

INDIANS. See BONDS.

INJUNCTIONS. See APPELLATE PRACTICE, 5; NUISANCES.

INSTRUCTIONS TO JURY. See PLEADING AND PRACTICE, 1, 11, 14.

INSURANCE. See LIFE INSURANCE.

INTEREST. See ACCOUNTING, 2, 3.

INTERROGATORIES. See ATTACHMENT, 1.

INTERVENING PARTIES. See ATTACHMENT, 3, 5, 6.

INTOXICATING LIQUORS. See CRIMINAL LAW, 2, 5; EQUITY, 5.

INVENTIONS. See PATENTS.

JOINDER OF ISSUE. See JUSTICES OF THE PEACE, 5, 6; PLEADING AND PRACTICE, 20.

JOINT TENANCY.

1. While in construing a deed the construction is favored which makes a tenancy in common rather than a joint tenancy, it is a rule of the common law in force in this District that a conveyance of land to two or more persons without any sufficient indication of intention in the instrument that the grantees are to hold in severalty, is to be construed as creating a joint tenancy and not a tenancy in common, whatever may have been the intention of the parties in that regard. *Seitz v. Seitz*, 358.

2. In construing such a deed its terms can not in the absence of latent ambiguity be varied or explained by oral evidence. *Id.*
3. Where a recital in such a deed (which conveys to a brother of the grantor and the wife of another brother an undivided two-thirds interest, the grantor retaining a one-third interest) is to the effect that the purchase money had been paid jointly by the several parties, such recital will not convert the tenancy created from a joint tenancy to a tenancy in common. *Id.*
4. When the *habendum* and *tenendum* clause in such a deed provides that the grantees shall hold the property "to their sole use, benefit and behoof forever," the term *sole* is not equivalent to *several*, but to *only* or *exclusive*, and therefore by its use in such connection a tenancy in common is not created. *Id.*
5. The fact that the original joint interest recited in such a deed to have been in the grantor, was severed, as to the grantor on the one hand and the grantees on the other, by the execution of the deed, does not justify a construction of the instrument as a tenancy in common. There is no inconsistency, legal or equitable, in the severance of his interest by the grantor and the continuance of the other in joint tenancy. *Id.*

JUDGMENTS. See ATTACHMENTS, 3; DEEDS OF TRUST, 1; PLEADING AND PRACTICE, 20.

JUDGMENTS, VACATION OF. See APPELLATE PRACTICE, 3.

JUDICIAL DISCRETION. See APPELLATE PRACTICE, 10; CRIMINAL LAW, 3, 4; DIVORCE, 5; EJECTMENT, 1; PLEADING AND PRACTICE, 8, 23.

JURISDICTION. See ATTACHMENT, 3; EQUITY, 1; FOREIGN CORPORATIONS; PLEADING AND PRACTICE, 17; JUSTICES OF THE PEACE, 2; ORPHAN'S COURT; SOCIAL CLUBS, 1.

JURISDICTION, PLEAS TO. See PLEADING AND PRACTICE, 18.

JURY, RIGHT TO POLL. See PLEADING AND PRACTICE, 2.

JURY TRIAL. See JUSTICES OF THE PEACE, 1.

JURY, QUESTIONS FOR. See NEGLIGENCE; PLEADING AND PRACTICE; STREET RAILWAYS, 3.

JUSTICES OF THE PEACE. See ATTACHMENT, 4.

1. An order of the court below quashing a writ of *certiorari* to a justice of the peace to prevent the empaneling of a jury in a cause pending before him, *affirmed*; *following* *Hof v. Capital Traction Company*, 10 App. D. C. 205. *RR. Co. v. Church*, 57.
2. The act of Congress of February 19, 1895 (28 Stat. 668), enlarging the jurisdiction of justices of the peace in this District, is constitutional; *following* *Railway Co. v. O'Neal*, 10 App. D. C. 205. *Carver v. O'Neal*, 353.
3. The statements contained in the return made to a writ of *certiorari* must, on an appeal from an order quashing the writ, be taken to be true, when in conflict with the statements of the petition for the writ. *Id.*

4. Where a complaint before a justice of the peace sufficiently informs the defendants what the cause of action is, and it does not appear that a refusal of the justice to require of the plaintiff a bill of particulars in any manner injured or hindered the defendants, such refusal will not be held to be error. *Id.*
5. *Quære*, whether irregularities in a trial before a justice of the peace, such a failure by the justice to require a bill of particulars, or by one of the parties to file a joinder of issue, can be inquired into by *certiorari*. *Id.*
6. A writ of *certiorari* to a justice of the peace is properly quashed where the alleged irregularity consists of the fact that a jury was empannelled on demand of the defendant before a formal joinder of issue by the plaintiff upon the pleas of the defendant, and the justice proceeded to hear the evidence of the defendant and render the judgment in his favor, the plaintiff declining to join issue or participate in the trial. *Bradshaw v. Earnshaw*, 495.

LACHES. See EQUITY, 4.

LANDLORD AND TENANT. See EJECTMENT, 3, 4.

LATENT AMBIGUITY. See JOINT TENANCY, 2.

LEASE. See RAILROADS, 3, 4.

LEGACIES. See WILLS.

LESSOR AND LESSEE. See EJECTMENT, 3, 4, 5.

LEVY OF EXECUTION. See ATTACHMENT, 4.

LIMITATIONS. See STATUTE OF LIMITATIONS.

LIENS. See ATTACHMENT, 2.

LIFE INSURANCE.

1. A stipulation in a policy of insurance relieving the insurer of liability, except for assessments paid, in case of the suicide of the insured, whether voluntary or involuntary, sane or insane, is valid and will be given effect according to the terms of the contract. *Somerville v. Indemnity Asso.*, 417.
2. If in a suit on a policy of insurance containing such a stipulation where the defence is suicide, the evidence is so clear as to exclude any other rational hypothesis than that of suicide as the cause of death, the ordinary presumption against the fact of suicide will not be allowed to counteract and destroy the rational conclusion deducible from such clear and definite proof, and it is proper for the trial court to direct a verdict for the defendant. *Id.*

LIQUOR, SALE OF. See CRIMINAL LAW, 2-5.

MANDAMUS. See APPELLATE PRACTICE, 14; PATENTS, 1.

1. A petition for a writ of *mandamus* to a public officer of the United States abates by reason of his retirement from office as well after judgment and pending an appeal as before. *Seymour v. Nelson*, 58.

2. And in such event the practice is not to dismiss the appeal but to reverse the judgment and remand the cause to the lower court with direction to dismiss the suit for want of proper parties. *Id.*

**MANDATE.** See APPELLATE PRACTICE, 14.

**MARRIED WOMEN.** See HUSBAND AND WIFE.

**MERGER.** See DEEDS OF TRUST, 1.

**MESNE PROFITS.** See EJECTMENT, 6.

**MISTAKE.** See ACCOUNTING, 1; PATENTS, 24.

**MORTGAGES, FORECLOSURE OF, IN EQUITY.** See EQUITY, 3, 4.

**MOTIONS TO STRIKE OUT TESTIMONY.** See APPELLATE PRACTICE, 10.

**MUNICIPALITIES.** See STATUTE OF LIMITATIONS, 1; STREETS AND HIGHWAYS.

**MUTUAL ACCOUNTS.** See ACCOUNTING, 1; STATUTE OF LIMITATIONS.

**MUTUALITY.** See CONTRACTS, 1.

**NEGLIGENCE.** See APPELLATE PRACTICE, 6; RAILROADS, 1-3; STREET RAILWAYS, 1-4; STREETS AND HIGHWAYS.

As a general rule, it is only where the circumstances of a case are such that the standard and measure of duty are fixed and defined by law and are the same under all circumstances, or where the facts are indisputable, and but one reasonable inference can be drawn from them, that the court can declare as matter of law that there is such contributory negligence as will defeat an action; ordinarily the question of negligence is a question of fact for the jury. *RR. Co. v. Grant*, 107.

**NON PROS.** See PLEADING AND PRACTICE, 25.

**NON SUIT.** See PLEADING AND PRACTICE, 25.

**NOTARIES PUBLIC, SIGNATURE AND SEAL OF.** See PLEADING AND PRACTICE, 5.

**NOTICE.** See ATTORNEY AND CLIENT; EJECTMENT, 5; PATENTS, 24; STREET RAILWAYS, 4.

The omission of the words "before me" by the recorder of deeds in his transcription of a certificate of acknowledgment attached to a deed, reading that the grantor "personally appeared before me on the day and date hereof," does not make the record of the deed ineffectual to give constructive notice to third persons of the transfer; and if the transcript be subsequently corrected by the recorder, the record is admissible in evidence. *Sis v. Boarman*, 116.

**NUISANCES.**

In a suit by property owners to enjoin an oil company from increasing its plant in a certain neighborhood upon the ground that it would aggravate a nuisance which had existed for five

years or more, an order temporarily enjoining the defendant from erecting a proposed new oil tank, and also enjoining it from using any of the previously existing tanks, storehouses, etc., was *modified* by allowing the defendant to continue to use existing structures, and as modified *affirmed*. *Oil Co. v. Oeser*, 80.

OBJECTIONS TO EVIDENCE. See APPELLATE PRACTICE, 11.

OBLIGOR AND OBLIGEE. See BONDS.

OFFER AND ACCEPTANCE. See EQUITY, 1, 2.

OIL TANKS. See NUISANCES.

ORDER OF PROOF. See PLEADING AND PRACTICE, 7.

ORPHANS' COURT.

An order of the Orphans' Court of this District admitting a will of personalty and realty to probate after a trial by jury of contested issues certified to the Circuit Court, is not conclusive as to the realty when offered in evidence by the devisees, in a subsequent action of ejectment between the same parties; the Orphans' Court having no jurisdiction over the devise of real property. *Perry v. Sweeny*, 404.

PARENT AND CHILD. See DIVORCE, 2-5; TRUSTS, 2, 5, 8.

PAROL EVIDENCE. See EVIDENCE, 1; FRAUDULENT CONVEYANCE, 1.

PAROL EVIDENCE TO VARY WRITTEN INSTRUMENT. See EVIDENCE, 1; JOINT TENANCY, 2.

PAROL TRUSTS. See TRUSTS, 1-12.

PARTICULARS BILL OF. See CRIMINAL LAW, 2, 3, 4.

PARTIES. See MANDAMUS, 2.

PARTIES TO ACTION. See EJECTMENT, 1, 6.

PARTITION. See DEEDS OF TRUST, 2.

PARTNERSHIP. See PLEADING AND PRACTICE, 9, 10, 12.

If two or more persons, without a special or express agreement to form a partnership, contribute to a fund to be invested as occasion offers, in notes, stocks and the like, and agree to share the gains and losses thereof, they thereby become partners. *Robinson v. Parker*, 132.

PARTRIDGE. See CRIMINAL LAW, 1.

PART PERFORMANCE. See TRUSTS, 11.

PASSENGERS. See STREET RAILWAYS, 1-4.

PATENTS.

1. A judgment dismissing a petition for a writ of *mandamus* to the Commissioner of Patents, *affirmed*; *following Bernardin v. Seymour*, 10 App. D. C. 296. *Bernardin v. Seymour*, 91.
2. When all the tribunals of the Patent Office have decided adversely to an applicant for a patent, the concurrent decision will not be reversed except in a very clear case. In *Re Barratt*, 177.

3. The record in a case appealed from the Commissioner of Patents upon his refusal to grant a patent for an alleged improvement in the construction of needle cylinders for knitting machines, examined and *held* insufficient to show that the appellant's device showed patentable novelty, although apparently a substantial and useful improvement. *Id.*
4. Where on appeal from a decision of the Commissioner of Patents a record was allowed to be filed in the case by appellee upon assurance that it would have some material bearing upon the question of the issue presented by the appellee, but on consideration it was found that the record had no such bearing, *held*, that the record so introduced must be at the cost of the appellee. *Stevens v. Seher*, 245.
5. It is of the utmost importance that strictness be observed as to the dates furnished in preliminary statements required in cases of interferences, for if parties were allowed to vary their dates at pleasure as to the time of discovery, invention, or disclosure, it would inevitably lead to the imputation of deception and bad faith practiced on the part of the party so changing his dates. *Id.*
6. If any material error occurs in the preliminary statements, or other statements made to the office, through inadvertence or mistake, the statement may be corrected on motion upon showing to the satisfaction of the Commissioners that the correction is essential to the ends of justice, and the motion to correct the statement must be made, if possible, before the taking of any testimony and as soon as practicable after the discovery of the error. It is only upon complying with this rule that the correction of any material error in preliminary statements can be made. *Id.*
7. On the proof, *held*, that the claim of Seher is not sufficiently and definitely established to maintain his patent, it having, as it can have, only *prima facie* effect; that he has failed to show that he has fully and completely established by experimental tests so as to enable persons reasonably skilled in the science of chemistry to determine whether or not the composition made and claimed by him as new and valuable in the arts really possesses those properties which he claims as the essential character as an operative means, for no invention or discovery in such case as the present can be regarded as complete until such tests have been applied and have been successfully maintained. *Id.*
8. In a case like the present the patent should state and fully disclose the component parts of the composition claimed with clearness and precision and not leave a person attempting to use the discovery to find it out by experiment. If the description be so vague and uncertain that no one can tell with certainty, except by independent experiment, how to apply the

- discovery and what exact result may be expected therefrom, the patent is void. *Id.*
9. The decision of the Acting Commissioner of Patents in awarding priority to *Seher* reversed. *Id.*
  10. A complete conception as defined in an issue of priority of invention is a matter of fact and must be clearly established by proof. The conception of the invention consists in the complete performance of the mental part of the inventive act. All that remains to be accomplished in order to perfect the act or instrument belongs to the department of construction, not invention. It is therefore the formation in the mind of the inventor of a definite and permanent idea of the complete and operative invention as it is thereafter to be applied in practice that constitutes an available conception within the meaning of the patent law. *Mergenthaler v. Scudder*, 284.
  11. The date of the conception is the date when the idea of means, including all the essential attributes of the invention, becomes so clearly defined in the mind of the inventor as to be capable of exterior expression, and it is settled both by practice and express decision that such exterior expression of the mind of the inventor when relating to machinery may be by exhibits either in the form of drawings or by model, so as to lay the foundation of a claim to priority, if thereby the invention be made sufficiently plain to enable those skilled in the art to understand it. *Id.*
  12. The fact of conception by an inventor, for the purpose of establishing priority, can not be proved by his mere allegation nor by his unsupported testimony where there has been no disclosure to others or embodiment of the invention in some clearly perceptible form, such as drawings or model, with sufficient proof of identity in point of time. *Id.*
  13. Any full and accurate description of the invention, either in words or drawings or model, if it be of a machine, or even an unsuccessful effort to embody the conception, when the effort discloses that the idea was complete, will suffice, although the attempt to represent it may have failed. In the absence of all other proof the date of the application for a patent, if containing a complete description, is taken as the date of the conception. *Id.*
  14. If drawings be exhibited and relied on as evidence of the conception of the invention, they must show a complete conception, free from ambiguity or doubt, and such as would enable the inventor or others skilled in the art to reduce the conception to practice without any further exercise of inventive skill. *Id.*
  15. Where drawings are in many essential particulars defective and wanting in completeness as means of showing and illustrating an invention involved in interference, such defects and want

- of completeness in the drawings can not be aided and the defective drawings made effective by construction or by reference to the prior state of the art. *Id.*
16. Where an inventor has undertaken to invent and construct a machine essentially different from preexisting machines and not simply a mere improvement upon previous inventions, it is necessary for him to furnish such full, clear, and definite drawings of his invention to prove conception as will enable any person skilled in the art of construction of such machines to reduce the invention to practical form. *Id.*
  17. The modification of the pin used in a device for coupling cars from a round shank to a square shank with an oblong head, and the substitution of this modification in form for that put in use in the original invention is not such a departure from the original invention as to disentitle the inventor to the right of priority, as against a party who had conceived subsequently to the original invention, but not put into practical operation, a device similar in principle, but of different form and operation. *Hien v. Buhoup*, 293.
  18. The change from a round-shanked pin with a button head to a square-shanked pin with oblong head, to remedy a defect in operation, is simply a matter of variation of construction, not affecting the substance of the invention claimed, and could well be made by mere mechanical skill without the exercise of the faculty of invention. *Id.*
  19. Where the decisions of all the tribunals of the Patent Office are in favor of the claim made by one of the parties to an interference, it must be made clearly and affirmatively to appear that such decision is erroneous to justify this court in reversing it. *Id.*
  20. *Held*, that it being clearly shown that the appellee was the first to conceive the device in issue, and the first to reduce to practice, and also the first to apply for a patent, he was entitled to be declared the prior inventor. *Id.*
  21. A decision of the Commissioner of Patents awarding priority of invention to S. and H. *affirmed* for the reason that although the rival applicant was the first to conceive, he was the last to reduce the invention to practice, and did not use due diligence in such reduction to practice. *Platt v. Shipley*, 576.
  22. A person can not be charged in law with any want of due diligence before the advent of a rival inventor upon the field; but at and after that time he becomes liable to lose the benefit of his previous conception unless he uses due diligence. Delay for the purpose of the elaboration and perfection of a crude conception may well be commended; but it will not be excused where no such end is in view. *Id.*
  23. The fact that a party does not know that a rival has entered the field is no excuse for delay, since the risk that a rival may appear at any time is something which every inventor is bound

- to contemplate and to anticipate, and in this lies the fundamental reason for the requirement of due diligence. *Id.*
24. A mistake by a party in supposing that the invention was covered by a prior patent granted to him can not under any known principle of law be considered a good excuse for delay in perfecting the invention or filing an application covering the same. Under the circumstances of this case the applicant is, furthermore, chargeable with the knowledge possessed by his agent or attorney as to the scope of the former patent. *Id.*
25. The practice of the Patent Office is not a matter for regulation by this court; and irregularities therein, even if patent on the record will only be considered by this court when some substantial right of a party has been denied and the point saved for presentation on appeal. *In re Neill*, 584.
26. Where appellant claimed that patents were wrongly granted to E., and that after he had adopted E.'s claim his application should have been placed in interference with E., *held* that whether the grant of E.'s patent was right or wrong or capable of satisfactory explanation, and whether an interference should be declared, are matters not within the jurisdiction of this court. *Id.*
27. If this court had a right to inquire into the propriety of the issue of the patents to E., and it was plain that an error had been committed therein, that would not excuse a similar error in favor of the appellant in order that he might be put in interference with him. *Id.*
28. After examination of the patents cited as references against appellant's claim, *held*, that, considered together, they constitute complete anticipation of the process claimed to have been discovered by appellant, and the decision of the Patent Office *affirmed*. *Id.*
29. Where each party to an interference attacks the invention of the other as impracticable and therefore devoid of patentable novelty, *held* that that is a question which this court can not consider in an interference proceeding. That there may be extreme cases in which it would be proper in interference proceedings to raise and determine the question of the patentability of the device in controversy may be conceded, but ordinarily no such question can arise in this court in such proceedings. *Dodge v. Fowler*, 592.
30. Where it is claimed that an alleged invention is wanting in patentability or wanting in identity with a rival applicant's device, *held* that the proper course to pursue is to move for a dissolution of the interference. The motion can not be made in this court, and except, perhaps, in very extraordinary cases no such question can properly be raised in or considered by this court. This must be regarded both as good practice and well-settled law. *Id.*

31. Although F. was the first to conceive, D. was the first to reduce to practice, and as F. did not use due diligence in perfecting the invention, *held* that D. should be awarded priority. *Id.*
32. Where the testimony showed that F.'s delay was occasioned only by the fact that some one to whom he had made application refused or declined at the time to construct a machine for him, *held* that if such a cause were allowed to excuse total inaction in regard to the invention and the discarding of it for the time for other and more immediately profitable enterprises, it is difficult to see why inaction might not be justified forever and all rival inventors effectually barred out of the field of invention. *Id.*
33. Although priority of invention is awarded to D. over F., yet it is not to be understood by the decision in awarding priority to D. that he is entitled to a patent for his invention, for from the statements of the Commissioner and the Board of Examiners the inference to be drawn would seem to be that D.'s device is found to be wanting in patentability and therefore that the declaration of interference was based upon mistake or inadvertence.
34. While no motion was made by F. to dissolve the interference, yet if under the law and the rules of the Patent Office it is not improper after adjudication of priority of invention to refuse a patent to the successful party in the interference proceedings upon the grounds that have first been developed in those proceedings or upon grounds manifested at any time after the declaration of interference the court in its decision on priority is not to be understood as precluding such action by the Office. *Id.*

PAUPERS. See POOR CONVICTS; UNITED STATES COMMISSIONERS, 3, 4.

PERFORMANCE. See TRUSTS, 11.

PLEADING AND PRACTICE. See APPELLATE PRACTICE; ATTACHMENT, 1; CERTIORARI; CRIMINAL LAW, 2, 3, 4; EJECTMENT, 1, 6; EQUITY PLEADING AND PRACTICE; EVIDENCE, 8; JUSTICE OF THE PEACE, 1, 3, 4, 5; LIFE INSURANCE, 2; MANDAMUS, 1, 2; NEGLIGENCE; STREET RAILWAYS, 3.

1. Where in a charge to the jury it appears that the trial court was not merely commenting upon the evidence, but peremptorily instructing the jury in terms which left them no option but to return the verdict they rendered, and such instructions are erroneous, the error is reversible error. *Brown v. RR. Co.* 37.
2. The verdict of a jury, whether oral or sealed, can not be received from eleven of the jurors, one of the number being absent, the right to poll the entire jury being an absolute right in either party. *D. C. v. Humphries*, 68.
3. A sealed verdict so rendered is a mere nullity and of no effect,

- but *quære*, whether a judgment rendered upon such a verdict is void or only voidable. *Id.*
4. This court will not be disposed to question under any circumstances a decision of the General Term of the Supreme Court of the District of Columbia upon a question of practice. *Hutchins v. Maneely*, 88.
  5. An affidavit under the 73d Rule of that court may be made before the notary public of a State, and is sufficiently authenticated by his signature and seal. *Id.*
  6. A variance between the allegations of a declaration and the proof, to be material, must be such as could have misled or operated to the surprise of the defendant. *RR. Co. v. Grant*, 107.
  7. The common law practice requiring that the plaintiff shall offer the whole of his evidence in support of the issue which he maintains; that the defendant shall then offer evidence to maintain his entire case, and that the plaintiff is then limited in reply to new matter only that has been raised in the defence, prevails in this District. *Robinson v. Parker*, 132.
  8. The discretion of trial courts in the application of rules of trial practice, is so large that its exercise will rarely be reviewed on appeal. *Id.*
  9. In a suit on a promissory note by several plaintiffs suing as co-partners, in which the issue is as to the existence of the partnership, the sworn statements of the plaintiffs in other suits denying the existence of the partnership, offered by the defendant after the plaintiffs have closed their case, constitute new matter which the plaintiffs are entitled to rebut. *Id.*
  10. A prayer for instruction that if the jury should find the facts which they were instructed would constitute a partnership, "then they are instructed that such relationship could not be affected by subsequent declarations by any one or all of the parties concerned," is erroneous, as tending to exclude from the consideration of the jury the effect of such declarations upon the question of whether such facts actually existed. *Id.*
  11. A trial court is not required to amend or modify a prayer presented in an objectionable form, and its refusal is therefore not reversible error. *Id.*
  12. A special plea denying the existence of a partnership alleged by the declaration to have existed between the plaintiffs (under Rule 112 of the Supreme Court of this District, providing that the special character in which the plaintiff sues shall not be considered in issue or necessary to be proved, unless by special plea under oath as to the truth thereof, the same be denied), is not a technical plea in abatement, but a special plea of denial consistent with the ordinary pleas in bar provided for by the rules of that court and cognizable with them. *Id.*
  13. Under the statute of 9 Anne, Ch. 20, Sec. 2, which is in force in this District, the verdict of the jury is conclusive as to all

- matters of fact involved in a trial. *De Yturbide v. Metropolitan Club*, 180.
14. Prayers for instruction to the jury which conclude with a direction to find a verdict for the party offering them, must include every fact and circumstance in evidence that might justify an adverse conclusion, and make it clear that upon the evidence thus presented the adverse party has no right to a verdict in his favor.
  15. Where a decree of divorce offered in evidence in a collateral suit is not offered to operate as an estoppel, but only by way of explanation and as corroborative of other testimony, the failure to prove the pleadings and depositions in the divorce proceedings is not ground for rejecting the decree itself. *Droop v. Ridenour*, 224.
  16. In a suit against a foreign corporation, a return of the marshal of service on the defendant by service on C. H. C., agent, makes out a *prima facie* case that the defendant was doing business in the District as provided by R. S. D. C., Sec. 790, as well as of the agency of the party so served. *Howard v. Rwy. Co.*, 300.
  17. Sec. 790, R. S. D. C., providing for the service of process on foreign corporations, was intended merely to afford a means of bringing such corporations before the courts, and does not limit the general jurisdiction of the courts of the District, or prevent their jurisdiction from attaching where such a corporation might appear and answer; *distinguishing* *Ambler v. Archer*, 1 App. D. C. 94. *Id.*
  18. When a judgment by default is entered after pleas to the jurisdiction are stricken out, and the default on motion of the defendant is set aside upon condition that the general issue shall be pleaded, the acceptance of such condition constitutes an abandonment of the pleas to the jurisdiction and any claim of invalidity in the service of the summons, and estops the defendant from afterwards questioning the correctness of the court's ruling in striking out the pleas. *Id.*
  19. The amendment of a declaration against a railroad company for damages for personal injuries, so as to change the form of action from assumpsit to tort, will not open the case to the bar of the statute of limitations. *Id.*
  20. A failure to join issue is cured by verdict and judgment. *Carver v. O'Neal*, 353.
  21. While great strictness is not required of a defendant in his affidavit of defence under the 73d Rule of the Supreme Court of the District, he can not be permitted to evade the rule by making vague and indirect statements in his affidavit, when it is evidently in his power to set forth his defence, if he has one, with the particularity which the rule contemplates. *Chapman v. Coal Co.* 386.

22. An affidavit of defence considered and *held* insufficient on account of vagueness and indefiniteness. *Id.*
23. The question of the preponderance of the testimony is always one for the jury, subject to the wise discretion of the trial court to set aside its verdict, not reviewable on appeal. *RR. Co. v. Adams*, 396.
24. When objection is made to the introduction of testimony the specific ground of objection should be stated, so that it may appear upon the record, and also that the other party may have an opportunity to obviate it. *De Forest v. U. S.* 458.
25. A plaintiff may elect to take a *nonsuit* or *non pros* of his case at any stage of it before verdict rendered, subject to payment of the defendant's costs. *Bradshaw v. Earnshaw*, 495.
26. To strike out the entire substance of a declaration, which does not present a case within the jurisdiction of the court, and to insert a different cause of action, though relating to the same subject-matter, is not properly an amendment, but is in effect a new action, and is not allowable. *Ex Parte Mansfield*, 558.
27. Where on appeal a judgment has been reversed on the ground that the trial court was without jurisdiction because of the amount in controversy, and the cause remanded in order to allow the plaintiff to enter a nonsuit, or upon failure to do so, directing the trial court to dispose of the case in a manner not inconsistent with the opinion of the appellate court, the trial court can not properly allow an amendment of the declaration so as to set up a different cause of action than that set up in the original declaration, although relating to the same subject-matter. *Id.*

PLEA IN ABATEMENT. See PLEADING AND PRACTICE, 12.

POLICE COURT. See UNITED STATES COMMISSIONERS, 3, 4.

The Police Court of this District, although a court of the United States in one sense, is not a court of the United States within the meaning of the Federal Constitution. *U. S. v. Mills*, 500.

POLICE POWERS.

1. Congress has the same police powers in the District of Columbia as the State legislatures have within their several jurisdictions. *Lansburgh v. D. C.*, 512.
2. It is only where a statute purporting to exercise police powers has no real or substantial relation to the protection of the public health, safety, peace and morals, or is a palpable invasion of the rights secured by the fundamental law, that the courts will declare it void. *Id.*

POLICY OF INSURANCE. See LIFE INSURANCE.

POOR CONVICTS. See UNITED STATES COMMISSIONERS, 3, 4.

Sections 1042 and 5296, R. S. U. S., relating to the discharge of poor convicts who are unable to pay fines imposed upon them after 30 days imprisonment for the nonpayment of such fines, are

locally applicable to this District and are in force here. U. S. v. Mills, 500.

**PRAYERS FOR INSTRUCTIONS, MODIFICATION OF.** See PLEADING AND PRACTICE, 4, 11.

**PREFERENCES.** See ATTACHMENT, 6; FRAUDULENT CONVEYANCES, 6, 7.

**PREJUDICIAL ERROR.** See EVIDENCE, 5.

**PREPONDERANCE OF EVIDENCE.** See APPELLATE PRACTICE, 1; PLEADING AND PRACTICE, 23; STREET RAILWAYS, 3.

**PRESUMPTIONS.** See ACCOUNTING, 1; ASSIGNMENTS, 2; CRIMINAL LAW, 8; HUSBAND AND WIFE, 3; LIFE INSURANCE, 2.

**PRINCIPAL AND AGENTS.** See PATENTS, 24.

**PRINCIPAL AND SURETY.** See BONDS.

**PROBATE.** See ORPHANS' COURT.

**PROCESS.** See FOREIGN CORPORATIONS; PLEADING AND PRACTICE, 16, 17, 18.

**PROCESS, SERVICE OF, ON CORPORATIONS.** See FOREIGN CORPORATIONS; PLEADING AND PRACTICE, 16, 17.

**PROOF, ORDER OF.** See PLEADING AND PRACTICE, 7.

**PROMISSORY NOTES.** See ACCOUNTING, 1; HUSBAND AND WIFE, 1.

**PROSTITUTION.** See CRIMINAL LAW, 6-10.

**PROXIMATE CAUSE.** See STREETS AND HIGHWAYS, 3.

**QUAIL.** See CRIMINAL LAW, 1.

**QUESTIONS FOR JURY.** See NEGLIGENCE; STREET RAILWAYS, 3.

**RAILROADS.** See EVIDENCE, 7, 8; STREET RAILWAYS.

1. In the absence of a special contract to the contrary, a selling carrier's duty is completely discharged by a safe carriage to the end of its own line, where a connecting carrier may be ready to continue the transportation on the designated route. *Howard v. Rwy. Co.*, 300.
2. Where two railroad companies enter into an arrangement by which practically a continuous system is formed under one management, and one of them sells a ticket under a condition limiting its liability to its own line, it is nevertheless responsible for the safe carriage of passengers over the other line; and such condition must be limited in its operation to such other lines as have their own separate and independent management. *Id.*
3. The fact that a railroad company had leased its lines to a foreign corporation will not exempt it from liability for an injury done in the operation of the railroad, where the State creating the lesser corporation had not given its consent to the making of the lease. *Id.*
4. Under State comity, the lease by a railroad company of its lines

within the State creating it, to a foreign corporation, will not be recognized by the latter State, where the charter of such foreign corporation prohibits it from operating or owning any railroad in the State in which it was incorporated. *Id.*

#### REAL ESTATE AGENTS.

1. Where real estate owners make a contract with a broker to pay him commissions on the sale of lots with building privileges, in which transactions no cash is paid by the purchasers, but the owners advance the money to make certain improvements, secure themselves by deed of trust on the property, and receive from the purchasers a bond conditioned upon the purchasers so making the improvements, and a suit is brought by the broker to recover his commissions on a given transaction, testimony tending to show the insolvency of the purchasers is incompetent, where they did or were ready to give the necessary deed of trust and bond. *Ross v. Fickling*, 442.
2. If a broker having charge of the property of a syndicate makes a contract of sale of lots to a nominal purchaser, to show business, and such purchaser subsequently assigns to a *bona fide* purchaser, who completes the sale, the statute of limitations will run against the broker's claim for commission as of the date of the *bona fide* sale and not of the nominal one. *Id.*

REAL ESTATE, SALE OF. See EQUITY, 1, 2; EQUITY PLEADING AND PRACTICE, 3; HUSBAND AND WIFE, -1; REAL ESTATE AGENTS.

REBUTAL TESTIMONY. See PLEADING AND PRACTICE, 9.

RECEIVERS. See FOREIGN CORPORATIONS.

RECORD OF DEEDS. See NOTICE.

REHEARING. See APPELLATE PRACTICE, 8.

#### RELEASE.

1. Where in an action at law to recover damages for personal injuries a release is pleaded in bar, the plaintiff may show it was procured by fraud; but to avoid the effect of the release, at law as well as in equity, the party seeking to avoid or rescind the instrument must restore the consideration received, or put the other party in *statu quo*; and this principle applies as well in cases of rescission or avoidance on the ground of misapprehension and a fraud as to other cases. *Lyons v. Allen*, 543.
2. And in such a case it is no answer to the objection that the consideration received has not been returned, or offered to be returned, that the amount received by the plaintiff under the release has been discounted from a verdict recovered by the plaintiff below. *Id.*

RELEASE BY MARRIED WOMAN. See HUSBAND AND WIFE, 4.

REMITTITUR. See APPELLATE PRACTICE, 9.

REMOTE CAUSE. See STREETS AND HIGHWAYS, 3.

- REPLICATION.** See EQUITY PLEADING AND PRACTICE, 1, 2.
- RESCISSION.** See RELEASE, 1.
- RES GESTÆ.** See EVIDENCE, 2, 3, 4, 5.
- RESULTING TRUSTS.** See TRUSTS, 1-12.
- RESTRAINING ORDERS.** See APPELLATE PRACTICE, 5;  
NUISANCES.
- REVERSIBLE ERROR.** See PLEADING AND PRACTICE, 1.
- ROCKVILLE & WASHINGTON TURNPIKE CO.** See SEVENTH STREET ROAD; STATUTE OF LIMITATIONS, 2.
- RULES OF COURT.** See APPELLATE PRACTICE, 4.
- SALE OF LIQUOR.** See CRIMINAL LAW, 5.
- SALE OF REAL ESTATE.** See EQUITY, 1, 2; EQUITY PLEADING AND PRACTICE, 3; HUSBAND AND WIFE, 1; REAL ESTATE AGENTS.
- SEALED VERDIOT.** See PLEADING AND PRACTICE, 2, 3.
- SENTENCE, EFFECT OF EXPIRATION OF, ON APPEAL.**  
See UNITED STATES COMMISSIONERS, 4.
- SEPARATE ESTATE.** See HUSBAND AND WIFE, 1.
- SETTLEMENT.** See TRUSTS, 2, 7.
- SEVENTH STREET ROAD.** See STATUTE OF LIMITATIONS, 2.
- The acts of Congress of March 31, 1871, authorizing the municipal authorities of this District to take the property and franchises of the Rockville and Washington Turnpike Co. and convert the Seventh street road into a public highway, and the act of Legislative Assembly of the District of August 9, 1871, appropriating a sum of money for payment of damages to the turnpike company, can not, of themselves, be held to work a conveyance of the title of the road to the District, especially in the absence of any proof of payment of the money so appropriated. *D. C. v. Krause*, 398.
- SEVENTY-THIRD RULE.** See PLEADING AND PRACTICE, 5, 21, 22.
- SEVERANCE.** See JOINT TENANCY, 5.
- SOCIAL CLUBS.**
1. A social club incorporated under the general incorporation laws of this District has the power after trial to expel one of its members for an offence against its by-laws, and if the trial is regularly conducted and the judgment of expulsion arrived at in good faith, there is no power or jurisdiction in the courts to reverse or vacate that judgment. *De Yturbide v. Metropolitan Club*, 180.
  2. When a by-law of such a club subjects a member to expulsion for conduct unbecoming a gentleman, upon a two-thirds vote of the board of governors, it is a question which can only be determined by the corporate authorities whether the conduct

of a member in accusing the daughter of a fellow-member, within the club and to members thereof, of writing anonymous letters, is a violation of the by-law.

3. Until the determination of the corporate authorities in such a case is successfully impeached, it will be presumed to have been fairly and *bona fide* made.

"SOLE." See JOINT TENANCY, 4.

SPECIAL PLEAS. See PLEADING AND PRACTICE, 12.

SPECIFIC PERFORMANCE. See EQUITY PLEADING AND PRACTICE, 3.

STATE COMITY. See RAILROADS, 4.

STATUTE OF FRAUDS. See TRUSTS.

STATUTE OF LIMITATIONS. See EJECTMENT, 6; EQUITY, 6; PLEADING AND PRACTICE, 19; REAL ESTATE AGENTS, 2.

1. Whether the statute of limitations will run against the District of Columbia in favor of a claimant by adverse possession of a portion of a public highway outside the boundary of the city of Washington, *quære*. D. C. v. Krause, 398.
2. There is nothing in the language of the acts of incorporation and the grants of the franchises of the Rockville and Washington Turnpike Company, to prevent the running of the statute of limitations against that company in favor of a claimant by adverse possession to a portion of the Seventh street road between the boundary of the city of Washington and the boundary of the District of Columbia. *Id*.
3. Where a mutual account exists between parties and the last item is barred by the statute of limitations, it is incompetent for one of the parties to remove the bar of the statute by entering subsequent items on his own side of the account. *Ross v. Fickling*, 442.

STATUTE OF LIMITATIONS, APPLICATION OF, IN EQUITY.  
See EQUITY, 3, 4.

STATUTES. See STATUTORY CONSTRUCTION.

STATUTORY CONSTRUCTION. See POLICE POWERS, 2.

A general revenue and remedial statute is to be given a liberal and reasonable construction, in aid of the remedy. *Lauer v. D. C.* 453.

STREET RAILWAYS. See STREETS AND HIGHWAYS, 2, 3.

1. It is not *prima facie* negligence for a person to attempt to board a horse car, however slowly moving, for the purpose of becoming a passenger. *Brown v. RR. Co.*, 37.
2. If a street car stops at a place where passengers may get off and on, although not a regular stopping place, it is the duty of those in charge of the car to hold it a sufficient time for passengers, by the exercise of reasonable diligence, to alight or get on in safety, and must in any event see and know that no

passenger is in the act of alighting, or is in a position otherwise which would be rendered perilous by the motion of the car when again put in motion; and if an employee fall in his duty in any of these respects, the company employer is liable for injuries resulting to a passenger. *RR. Co. v. Grant*, 107.

3. Where there is conflict of evidence in such a case as to whether there was negligence on the part of the railroad employee, the question is one for the jury, and whether the testimony preponderates the one way or the other is also exclusively for the jury and not for the court to decide. *Id.*
4. Actual or express notice by a passenger to the conductor of the car of an intention to alight is not required, if the conductor knew that the passenger was in the act of alighting, or if he did not know but ought to have known the fact, under all of the circumstances, the company would be liable; and an instruction that in such a case the passenger as a matter of law can not recover if he failed to give notice to the conductor, is properly refused. *Id.*

**STREETS AND HIGHWAYS.** See **SEVENTH STREET ROAD**; **STATUTE OF LIMITATIONS**, 1, 2.

1. The District of Columbia as a municipal corporation and the Commissioners of the District representing the corporation have the care and charge of, and the exclusive jurisdiction over all the public roads and bridges outside the limits of Washington and Georgetown, as well as the care and control of the streets and avenues of the city; and the corporation is liable for injuries to persons arising from the negligence of its officers and agents in constructing and maintaining in safe condition for the use of the public, the streets, avenues, alleys, public roads, bridges and all public sidewalks of the city and the District. *D. C. v. Sullivan*, 533.
2. A municipality may be liable in the first instance for a defect in its streets or highways caused by the negligence of a street railway corporation occupying an undue and unnecessary portion of the way. *Id.*
3. Where a person in the exercise of reasonable care is struck and injured by the car of an electric railroad company (the tracks of which were located under the direction and supervision of the District of Columbia), while walking on a sidewalk, negligently laid after the road was in operation in such close proximity to the track that cars running thereon projected one or two feet over and upon the sidewalk at the point where the accident occurred, the negligence of the District can not properly be said to be a remote and not the proximate cause of the injury, and the District is primarily liable. *Id.*

**SUICIDE.** See **LIFE INSURANCE**.

**TENANCY IN COMMON.** See **EJECTMENT**, 5; **JOINT TENANCY**, 1-5.

TENANCY. See EJECTMENT, 3, 4, 5.

TEMPORARY RESTRAINING ORDERS. See APPELLATE PRACTICE, 5; NUISANCES.

TERM OF COURT, EXTENSION OF. See APPELLATE PRACTICE, 2.

TICKETS, CONTENTS OF LOST. See EVIDENCE, 7, 8.

TORT, ACTION OF. See PLEADING AND PRACTICE, 19.

TRADING STAMPS. See GIFT ENTERPRISES.

TRIAL. See JUSTICES OF THE PEACE, 1, 6; PLEADING AND PRACTICE, 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 13.

TRUSTEES. See ACCOUNTING, 3; COPYRIGHT, 2; DEEDS OF TRUST, 2; TRUSTS, 12, 13, 14; WILLS.

TRUSTS. See ACCOUNTING, 3; ASSIGNMENTS, 1; WILLS.

1. A court of equity can not, under Section 7 of the Statute of Frauds, upon a petition by the heirs of the husband, execute a parol trust agreed upon between a husband and wife at the time of execution of deeds conveying to her the legal title to land, under which parol trust he was to retain the control and beneficial ownership of the property. *McCartney v. Fletcher*, 1.
2. Under Section 8 of the Statute of Frauds a resulting trust may arise where an estate is purchased in the name of one person but the purchase money is paid by another; but an exception occurs to this rule where the purchase is made and the purchase money paid by the husband or father and conveyance is taken in the name of the wife or child; in which case, there is *prima facie*, at least, no resulting trust to the purchaser, but the purchase and conveyance will be deemed a gift, advancement or settlement. *Id.*
3. In such cases, while parol evidence is admissible to establish the collateral facts, not contradictory to the deed, except in case of fraud, from which a trust may legally result, such evidence is received with great caution. *Id.*
4. Where, in such a case, it appears from the evidence that it was intended that the grantee should take the legal estate only, the equitable interest, or so much of it as was left undisposed of, will result to the grantor or his heirs; but it must clearly appear beyond doubt that the beneficial interest was not intended to be transferred. *Id.*
5. A conveyance to a wife or child will be presumed to carry a beneficial interest, and whenever that presumption is attempted to be overcome, it can only be done by the most indubitable evidence; and where a husband has divested himself of the legal estate in favor of his wife, the presumption that the beneficial interest was intended to pass, is so strong as to be almost irrebutable. *Id.*
6. Where it is sought to establish a resulting trust in favor of the

heirs of a husband who had allowed the legal title of his land to be taken in the name of his wife by absolute deeds, loose declarations made by the husband in which the wife is not shown to have joined or concurred, unsupported by evidence of any acts of dominion and control over the property after the making of the deeds to the wife, do not furnish evidence even tending to overcome the presumption that the wife took both the legal and beneficial estate in the property. *Id.*

7. The fact that such deeds recite money considerations as passing from the wife does not furnish evidence that the deeds were not intended as settlements upon the wife by the husband. *Id.*
8. No presumption that a personal benefit was intended to the party advancing the funds for the purchase of land in the name of another can arise where the obligation exists on his part, legal or moral, to provide for the grantee, as in case of a husband for his wife or a father for his child. *Id.*
9. The evidence produced on behalf of the complainants in such a case considered, and *held* not sufficient to establish a resulting trust, especially as against the sworn answer of the defendants. *Id.*
10. The evidence in such a case also held not sufficient to show such an agency on the part of the wife, or fiduciary relations between the husband and wife, as to overcome the presumption that the property was to be owned by her in her own right. *Id.*
11. The mere making of deeds by a husband to his wife, or his directing them to be made to her as grantee, is not a sufficient part or complete performance, in such a case, as will take the case out of the operation of the Statute of Frauds; nor will the exercise of such authority or supervision over the property as a husband usually exercises over the real estate of his wife, be construed into such acts of ownership as can only be referable to rights of his under the alleged trust. *Id.*
12. The mere refusal of a supposed trustee to execute a parol trust, or the denial of its existence, is not such a fraud as will take the case out of the Statute of Frauds and authorize a court of equity to enforce the trust. *Id.*
13. The mere reposing of confidence does not create a trust cognizable in equity or convert into a trustee the person in whom confidence has been reposed; but the assent, express or implied, of the person sought to be placed in such fiduciary relation, or where a trust has been devolved in consequence of privity of estate, or for any other reason, the assent of the person from whom such trust has been derived, must be shown in order to charge such person as a trustee. *Patten v. Warner*, 149.
14. A trustee is incompetent to purchase the property he holds in

trust from his *cestui que trust*; and although no conventional trust relations may exist between parties, yet if a relation of confidence exists, the person in whom confidence is reposed will not be permitted to derive any personal advantage from dealing with the property of the other; and any sale by the party reposing the trust to the other will be avoidable at the election of the former, unless he acted with a knowledge of all the material facts affecting the transaction and fully understood he was disposing of the property, and received, approximately at least, the full value thereof. *Marmion v. McClellan*, 467.

#### UNDUE INFLUENCE.

1. The undue influence for which a will or deed will be annulled must be such that the party making it has no free will, but stands *in vinculis*; it must amount to force or coercion, destroying free agency. *Towson v. Moore*, 377.
2. The presumption of the exercise of undue influence does not arise except where an advantage has accrued to a party under conditions arising of existing beneficiary or confidential relations which make it incumbent on the party to show the fairness of the transaction drawn in question; and in general, the burden of proving such undue influence is on the party alleging it. *Id.*
3. The declarations of a testator or grantor, made either before or after the execution of the will or deed, or of the transaction complained of are not admissible in evidence to show such undue influence, although they may be admitted to show mental condition. *Id.*
4. Influence gained by kindness and affection will not be regarded as undue, if no imposition or fraud be practiced, even though it induce a testator or grantor to make an unequal and unjust distribution of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made. *Id.*

UNITED STATES, BONDS TO. See BONDS.

#### UNITED STATES COMMISSIONERS.

1. The writ of *certiorari* can not be used to test the right of a party to hold the office of United States Commissioner, or the authority of the Supreme Court of the District to appoint such an officer. *U. S. v. Mills*, 500.
2. Whether the Supreme Court of this District has the authority to appoint a United States Commissioner, *quære*. *Id.*
3. The powers vested by Sec. 1042, R. S. U. S., relating to the discharge of poor convicts, in United States Commissioners can be exercised in this District only with reference to those cases in which persons are imprisoned for nonpayment of a fine

under sentence of the Supreme Court of this District, sitting as a circuit or district court of the United States, and administering the general penal code of the United States; and there is no warrant of law for the exercise of such powers with reference to the local penal law of the District of Columbia and the sentences of the Police Court. *Id.*

4. The writ of *certiorari* is the proper means of preventing the exercise by a United States Commissioner of such powers with reference to a person imprisoned under a sentence of the Police Court of this District; but where during the pendency of an appeal by the United States from an order quashing a writ of *certiorari*, the sentence of the prisoner expired, this court dismissed the appeal.

VARIANCE. See PLEADING AND PRACTICE, 6.

VENDOR AND VENDEE OF REAL ESTATE. See EQUITY, 1, 2.

VERDICT. See APPELLATE PRACTICE, 6, 9; PLEADING AND PRACTICE, 13, 23.

VERDICT, DEFECTS CURED BY. See ATTACHMENT, 3; PLEADING AND PRACTICE, 20.

VERDICT, DIRECTION OF BY COURT. See LIFE INSURANCE, 2.

VERDICT, IRREGULARITIES IN RENDITION OF. See PLEADING AND PRACTICE, 2, 3.

VOLUNTARY ASSIGNMENTS. See ASSIGNMENTS; FRAUDULENT CONVEYANCES, 6, 7.

WAIVER OF CITATION. See APPELLATE PRACTICE, 7.

WILLS. See ORPHANS' COURT; UNDUE INFLUENCE, 1-4.

A testator gave to his daughter a sum of money in trust to apply the same to the maintenance and education of his grandson away from his paternal home at a school to be selected by the daughter, and provided that if she was hindered by the child's parents in the execution of the trust, the fund should go to her absolutely. Claiming to be so hindered, the trustee wrote to the child's father that she had decided that the fund which by the conditions of the will reverted to her, should be invested by a friend in the child's name to be given him with the accumulated interest upon his reaching manhood, and that such friend would show her how to draw up a paper to insure the payment of the money to the child in event of her death. Subsequently the father wrote to the trustee that he declined to comply with the terms of the bequest and recognized its forfeiture by his son. The father thereafter claimed he had reconsidered and recalled his declination and the trustee claimed he had not done so. On attaining his majority the son filed a bill in equity against the trustee to establish a trust

and for an accounting, and this court *held*, reversing the decree of the lower court,

- (a) That the conditions of the bequest were valid;
- (b) That the express declination of the legacy by the child's father was at the time sufficient to justify the defendant's claiming the fund as her own;
- (c) That whether such declaration could be withdrawn by the father within a reasonable time, and the trust thereby reopened against the will of the defendant, *quære*; but if so, the burden of proving such withdrawal was on the complainant, and
- (d) That the expression by the defendant of an intention to invest the fund for the use of the child did not create a trust enforceable in equity, but amounted merely to a promise in favor of a volunteer supported by no valuable consideration. *Gwynn v. Gwynn*, 564.

*Ex. D. 13.*

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